Supreme Court, U.S.
FILED
(1)
031316 MAR 15 2004
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

WILLIAM F. NEIL, JR.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

J. GUSTY YEAROUT
Counsel of Record
C. EUGENIA LAMBETH
YEAROUT & TRAYLOR, P.C.
800 Shades Creek Parkway,
Suite 500
Birmingham, Alabama 35209
(205) 414-8160
Fax: (205) 414-8199

Attorney for Petitioner
William F. Neil, Jr.

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Does 28 U.S.C. § 1407 empower the Judicial Panel on Multidistrict Litigation to transfer to a class action settlement forum the case of an absentee class member who has no nexus to the class action forum and who seeks collateral review in his own forum for the settlement's violations of his rights to due process?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner:

William F. Neil, Jr.

Respondents:

American Home Products Corporation (name changed to Wyeth Pharmaceuticals, Inc., effective March 11, 2002); Wyeth-Ayerst Laboratories Company, Division of American Home Products Company (name changed to Wyeth Pharmaceuticals, Inc., effective March 11, 2002); A.H. Robins Company, Inc.; Gate Pharmaceuticals, Inc., A Division of Teva Pharmaceuticals; Teva Pharmaceuticals U.S.A., Inc.; SmithKline Beecham Corporation; and Medeva Pharmaceuticals, Inc. (name changed to Celltech Pharmaceuticals, Inc. effective February 16, 2001); Honorable Harvey Bartle, III, Judge, United States District Court, Eastern District of Pennsylvania; Judicial Panel on Multidistrict Litigation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
ARGUMENT	4
I. 28 U.S.C. § 1407 Must Be Construed So As To Provide An Absentee Class Member Collateral Review In His Own Forum For Alleged Due Process Violations In The Class Action Settlement Because A Contrary Construction Would Raise Serious Doubts About The Constitutionality Of § 1407	4
II. Neil Meets The Standards For Issuance Of A Writ	20
III. The Court Should Direct Issuance Of A Writ Appropriate To The Circumstances	23
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 16, 19, 20

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 18

Ashwander v. Valley Authority, 297 U.S. 288 (1936) 4

Ayers v. Jackson Township, 106 N.J. 557 (1987) 18

Bankers Life & Casualty Co. v. Holand, 346 U.S. 379 (1953) 21

Brown v. Gilmore, 533 U.S. 1301 (2001) 22, 23

Communist Party of Ind. v. Whitcomb, 409 U.S. 1235 (1972) 22

De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945) 21

Dewey v. Des Moines, 173 U.S. 193 (1898) 5

Fishman v. Schaffer, 429 U.S. 1325 (1976) 22

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 18

Hansberry v. Lee, 311 U.S. 32 (1940) 7, 8

Heiser v. Woodruff, 327 U.S. 726 (1946) 19

In re Amatex Corp., 37 B.R. 613 (E.D. Pa. 1983) 15

In re Real Estate Title & Svcs. Antitrust Litigation, 869 F.2d 760 (3rd Cir. 1989), *cert. denied sub nom., Chicago Title Ins. Co. v. Tucson Unified School Dist.*, 493 U.S. 831 (1989) 8

Jenkins v. McKeithen, 395 U.S. 411 (1969) 14

Juidice v. Vail, 430 U.S. 327 (1977) 17

TABLE OF AUTHORITIES – Continued

Page

Kerr v. United States District Court for the Northern District of California, 426 U.S. 394 (1976) 21

Kyriazi v. Western Elec. Co., 647 F.2d 388 (3rd Cir. 1981) 16

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) 4

Marbury v. Madison, 5 U.S. 137 (1803) 23

Martin v. Wilks, 490 U.S. 755 (1989) 7

Machinists v. Street, 367 U.S. 740 (1961) 4

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 16, 17

National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1978) 4

Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312 (1986) 22

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 20

Pennoyer v. Neff, 95 U.S. 714 (1878) 21

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 7, 11, 15, 16

Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943) 20

Schweitzer v. Conrail, 758 F.2d 936 (3rd Cir. 1985) 18

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 18

Standard Oil Co. v. State of N.J. by Parsons, 341 U.S. 428 (1951) 14

Treichler v. State of Wisconsin, 338 U.S. 251 (1949) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 4

U.S. ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540 (1937) 21

Valley Forge Christian College v. Americans United For Separation Of Church And State, 454 U.S. 464 (1982) 17, 22

Vance v. Terrazas, 444 U.S. 252 (1980) 6

Warth v. Seldin, 422 U.S. 490 (1975) 18

Whitmore v. Arkansas, 495 U.S. 149 (1990) 18

CONSTITUTIONAL PROVISIONS:

U.S. Const. Art. III 1

U.S. Const. Amend. XIV 1

STATUTES:

28 U.S.C. § 1254 1

28 U.S.C. § 1407 ..... *passim*

28 U.S.C. § 1651 ..... 21, 22

28 U.S.C. § 2072 19

RULES OF PROCEDURE:

Fed.R.Civ.P. 23 ..... *passim*

Fed.R.Civ.P. 82 19

Supreme Court Rule 21.1(a) 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum.L.Rev. 1343 (1995) 12

Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1968) 10

Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L.Rev. 1045 (1995) 12

Susan B. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va.L.Rev. 1051 (1996) 12

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.Chi.L.Rev. 1 (1991) 12

Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum.L.Rev. 1148 (1998) 11

J. Moore, *3B Moores Federal Practice* (2d ed. 1987) 10

Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) 10, 11

Herbert B. Newberg, *Newberg on Class Actions* (2d ed. 1985) 10

R. Stern & E. Gressman, *Supreme Court Practice* (6th ed. 1986) 6

C. Wright & A. Miller, *Federal Practice and Procedure* § 1789 (2d ed. 1986) 9, 10

TABLE OF AUTHORITIES – Continued

Page

Restatement (First) of Judgments § 86 (1942) 9

Restatement (Second) of Judgments § 42 (1982)..... 10

63C Am.Jur.2d Prohibition § 6..... 24

OPINIONS BELOW

The Court of Appeals for the Third Circuit did not write an opinion, and its order is retyped at Appendix 1. The transfer order of the Judicial Panel on Multidistrict Litigation is retyped at Appendix 2.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Due Process Clause; Constitution of the United States, Article III, Case or Controversy Requirement; 28 U.S.C. § 1407.

STATEMENT OF THE CASE

On November 18, 1999, Defendants entered into a nationwide class action settlement agreement with class counsel to resolve pending and potential legal claims arising from the drugs Pondimin and Redux (hereinafter "Fen/Phen"). On August 28, 2000, the United States District Court for the Eastern District of Pennsylvania entered an order approving the settlement as fair, reasonable, and adequate to all class members.

Neil was prescribed and took Fen/Phen in order to lose weight. He received no notice of the class settlement. In January 2001, Neil noticed that he had difficulty breathing, and in February 2001 he was examined by a pulmonary specialist, Dr. David Weill. Dr. Weill diagnosed Neil as having PPH. He concluded that Neil's PPH was caused by his use of Fen/Phen. (Appendix 33). Neil filed suit seeking damages for his injury from Fen/Phen in an Alabama state court.[1] The case was later transferred to MDL-1203, *In re Diet Drugs Products Liability Litigation*.

The settlement includes special provisions for class members who develop Primary Pulmonary Hypertension ("PPH"). Defendants requested Neil's medical records to compare to the settlement's PPH criteria. Dr. Weill reviewed the settlement and observed that the PPH criteria inaccurately reflected medical understanding of PPH, both currently and as of the date of the settlement, particularly concerning the alleged relationship between PPH and sleep apnea. Dr. Weill could not reconcile his findings to the settlement's flawed PPH criteria.

Dr. Weill's findings bring into question the adequacy of class representation as to PPH claimants. And, while the settlement's provisions "allow" PPH sufferers to bring a lawsuit for damages outside the settlement, this provision does not constitute a quid pro quo for being bound by the preset medical criteria, because the right to bring a

---

[1] *William F. Neil, Jr., v. American Home Products Corp., et al.*, Circuit Court of Jefferson County, Alabama, CV-02-20085.

lawsuit is already guaranteed by the U.S. Constitution. In addition, PPH claimants were given no right to opt out of these requirements and hence no effective right to opt out of the class. Meaningless opt out rights constitute another denial of due process. Moreover, future PPH claimants did not receive, nor could they have received, constitutionally adequate notice of the settlement because their injuries were not manifest at the time of the settlement, meaning they had no Article III case or controversy at that time.

Accordingly, Neil dismissed his lawsuit in MDL-1203 in order to obtain, through a declaratory judgment action in the instant case, collateral review of the settlement's deprivations of his constitutional right to due process. On January 13, 2003, Neil filed the instant lawsuit in the Northern District of Alabama for collateral review of the settlement for due process violations and monetary damages. (Appendix 11). On April 15, 2003, the JPML entered a conditional transfer order. (Appendix 7). Neil filed a notice of opposition to the transfer. On August 11, 2003, the JPML issued an order transferring this case to the Eastern District of Pennsylvania where it was assigned to the Honorable Harvey Bartle, III, for inclusion in coordinated or consolidated settlement proceedings occurring there as part of MDL-1203. (Appendix 2).

On October 2, 2003, Neil sought appellate review of the JPML's transfer of his case to MDL-1203 by applying to the Court of Appeals for a writ of mandamus directing the JPML to vacate its transfer order and the court to remand his case to the Northern District of Alabama. On December 15, 2003, the Third Circuit denied Neil's application for a writ of mandamus, thereby effectively holding that the

JPML has the authority under 28 U.S.C. § 1407 to transfer an action to another district for coordinated or consolidated settlement proceedings even though the action seeks collateral review of that settlement for due process violations. The Court of Appeals did not write an opinion in support of its judgment. (Appendix 1).

ARGUMENT

I. 28 U.S.C. § 1407 MUST BE CONSTRUED SO AS TO PROVIDE AN ABSENTEE CLASS MEMBER COLLATERAL REVIEW IN HIS OWN FORUM FOR ALLEGED DUE PROCESS VIOLATIONS IN THE CLASS ACTION SETTLEMENT BECAUSE A CONTRARY CONSTRUCTION WOULD RAISE SERIOUS DOUBTS REGARDING THE CONSTITUTIONALITY OF § 1407.

The JPML's transfer of an action seeking collateral review of a class settlement to the settlement forum infringes on an absentee class member's constitutionally protected rights and raises serious doubts about the constitutionality of § 1407. "When the validity of an act of Congress is drawn in question, . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute if fairly possible by which the question may be avoided." *Ashwander v. Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). *See National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1978); *Machinists v. Street*, 367 U.S. 740, 749 (1961).

Interpretation of a statute must begin with the statute's language. *E.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *Landreth Timber Co.*

v. Landreth, 471 U.S. 681, 685 (1985). Section 1407(a) provides, in relevant part, that transfers of a civil action involving one or more common questions of fact with a civil action pending in another district may be transferred for coordinated or consolidated proceedings upon a determination that the transfer "will promote the just and efficient conduct of such actions." Section 1407(a)'s operative terms are "just" and "efficient."

The import of the term "just" in terms of the law seems plain in requiring adherence to the requirements of due process. There is little reason to think that Congress did not intend the word "just" to bear its most common meaning when it used the word in § 1407(a). To ensure the constitutionality of § 1407 requires a finding that § 1407 does not provide the JPML the discretion to find it "just" to transfer a case legitimately asserting due process violations of a class settlement to the class settlement forum for settlement proceedings.

Neil's argument that § 1407 must be construed to avoid serious doubts regarding its constitutionality was not presented to the Third Circuit nor the JPML. However, the statement of the question fairly presented in this Petition for Certiorari is "deemed to comprise every subsidiary question fairly included therein." Supreme Court Rule 21.1(a). The argument is clearly relevant to the resolution of the question presented, i.e., whether § 1407 can be fairly construed as empowering the JPML to transfer an action to another district for coordinated or consolidated settlement proceedings when the action seeks collateral review of due process violations in the settlement and lack of personal jurisdiction. Consequently, the argument is "fairly included" in this brief. *Dewey v. Des Moines*, 173 U.S. 193, 198 (1898) ("Parties are not confined

here to the same arguments which were advanced in the courts below upon a Federal question there discussed.").

Even when an issue (as distinguished from an argument supporting an issue) has not been presented to the courts below or discussed in the petition for certiorari, this Court has reserved the power to address the new issue in appropriate circumstances. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). Cases presenting "appropriate circumstances" have generally involved one or more of the following factors: (i) origination in federal court as distinguished from state court; (ii) interpretation of federal law as distinguished from state law; (iii) presence of sufficient facts in the record to allow for a fair and intelligent decision on the new issue; (iv) opportunity for opposing parties to present briefs on the new issue; and (v) relevance of the new issue to an intelligent resolution of the case. *See generally* R. Stern & E. Gressman, *Supreme Court Practice*, §§ 3.24, 6.25, and 6.26 (6th Ed. 1986). The foregoing factors are present in the instant case. Consequently, not only is the new argument presented herein "fairly included" in support of the question presented in this petition, but "appropriate circumstances" also exist for a full and fair consideration of this new argument.

It is clear that Congress, in using the plain language that the JPML may transfer an action where the transfer will promote the "just" and "efficient" conduct of such action never intended for such transfer to occur when that action presents the lack of personal jurisdiction and due process challenges asserted in the instant case. Such a manner of statutory construction accords due respect to the rights of Congress, as contrasted with the rights of courts, to determine those instances which justify transfer of a case pursuant to § 1407. Consequently, Neil's case

should not have been transferred to MDL-1203. Moreover, a finding that § 1407 empowers the JPML to transfer an action to another district for coordinated or consolidated settlement proceedings when there is no personal jurisdiction and the action seeks collateral review of the settlement for due process violations would raise serious doubts regarding the constitutionality of § 1407. To avoid a judgment on the validity of § 1407, this Court should construe said statute as not authorizing transfer to a settlement forum where an action alleges legitimate due process violations from that forum's approval of the settlement.

A. An Absent Class Member With No Nexus With The Class Forum Has The Right To Collateral Review In His Own Forum For Due Process Violations In The Settlement.

Since this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), courts have allowed collateral review of class action judgments based on due process concerns. Due process in the class action context requires adequate representation "at all times" throughout the litigation, notice "reasonably calculated . . . to apprise interested parties of the pendency of the action," and an opportunity to opt out. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

In *Martin v. Wilks*, 490 U.S. 755 (1989), this Court held that even litigants who receive notice and an opportunity to be heard may collaterally attack a judgment if they did not appear in the suit and had no obligation to do so under the Federal Rules of Civil Procedure. Thus, a person who had notice and an opportunity to be heard in a

class action lawsuit is not required to intervene and can seek review of the resultant consent decree collaterally.

The Third Circuit has recognized that "[e]ver since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme." *In re Real Estate Title & Svcs. Antitrust Litigation*, 869 F.2d 760, 769 (3rd Cir. 1989), *cert. denied sub nom., Chicago Title Ins. Co. v. Tucson Unified School Dist.*, 493 U.S. 831 (1989). "Rather than threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure." *Id.*

The structure of Rule 23 dictates that the court's decision on adequacy of representation cannot be immune from challenge. Rule 23 only requires the court to formally consider adequacy once – in deciding whether to certify the class at all – and this is to be done "as soon as practicable after commencement of [the] action." Rule 23(c)(1), Fed.R.Civ.P. Therefore, a court's determination, under Rule 23(a)(4) is a prediction, not a conclusion. The court merely anticipates that the chosen "representative parties will fairly and adequately protect the interest of the class," while adequacy itself must be maintained "at all times." Because due process requires adequate representation "at all times," any single determination of adequacy is inherently tentative. It cannot anticipate whether the representation will be adequate after appeals are exhausted or after the determination of settlement fairness if there are no appeals. As Charles Wright has noted:

> [T]he determination by the original class action court to the effect that the representative adequately represented the class members, even though it may be clearly correct when it is made, may not be so at later stages of the litigation and a court being asked to bind an absent class member to a judgment, must evaluate the adequacy of the representation not only in terms of the first court's initial inquiry, but also in light of whether the representation appears adequate after termination of the suit.

C. Wright & A. Miller, *Federal Practice and Procedure,* § 1789 pp. 251-252 (1986).

When Rule 23 was amended in 1966, the Advisory Committee explicitly preserved the right of absent class members to contest the validity of a judgment reached in a representative capacity: "[S]ubdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action." *See also Restatement (First) of Judgments* § 86, Comment (H), § 116 (1942). The right to seek collateral review was unanimously recognized by all of the commentators writing immediately after the Rule was written. Judge Marvin Frankel observed:

> There are, of course, some obvious limitations in any case upon the extent to which absent parties will be concluded. For one thing, as the Advisory Committee observed, such parties have a *clear right in some later litigation to attack the judgment which purports to bind them.* In such a later case, at least the basic considerations going to the fairness of holding them bound will be open for reexamination. Factors which were not

> brought to the attention of the first court – including most centrally, the adequacy of representation in the first suit, cf. Hansberry [v. Lee] – may lead to a changed perspective.

Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1968) (emphasis added). *See also* 3B *Moores Federal Practice*, § 23.60 (2d ed. 1987); *Wright & Miller* § 1789, pp. 246-46 (2d ed. 1986); 3 *Newberg on Class Actions* § 16.24 (2d ed. 1985).

The Restatement of Judgments gives no deference to the original prediction of adequacy of representation, and indicates that collateral review is always available for absent class members who are entitled to have their claims of a denial of due process reviewed de novo. Section 42(1) holds that:

> A person is not bound by a judgment for or against the party who purports to represent him if: . . . (d) there was a substantial diversion of interest . . . or . . . (e) [t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.

Restatement (Second) of Judgments, § 42(1) (1982).

It is a well-established principle that "the court conducting the action cannot predetermine the res judicata effect of the judgment. This can be tested only in a subsequent action." Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) at § 16.25. "The potential impact of a class judgment is not a matter for determination by the deciding court. The res judicata effect of a class judgment can only be determined by a later court in light of a specific controversy." *Id.* at § 16.24.

In *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court affirmed the rule that a class action court cannot control the res judicata effect of its own judgment. In *Shutts*, a Kansas state court held that it had jurisdiction to bind out-of-state absent class members and that they were adequately represented by the named plaintiff. *Id.* at 803-805. After the Kansas Supreme Court affirmed these rulings, Phillips appealed to the U.S. Supreme Court, contending that the lower court lacked jurisdiction over out-of-state absent class members. The plaintiffs argued that Phillips lacked standing to assert the constitutional rights of the absent class members. The Court ruled that even though the issue of jurisdiction was fully litigated in the Kansas court by a class representative that court found to be adequate, the Kansas court's determination of jurisdiction would not preclude collateral attacks by absent class members. They could still sue Phillips in *other fora* and relitigate the issue of jurisdiction, which is what gave Phillips standing to raise the issue.

A class member "has a right to challenge, *in his local forum*, the approval of a mandatory class settlement for failure to satisfy requirements of adequate representation." Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) at § 16.25. Absent class members who do not have a sufficient nexus with the forum cannot constitutionally be compelled to litigate the absence of due process there. Class action rules and statutes do not impose such an obligation to appear, nor could they without subverting important values protected by the traditional collateral attack rule. *See* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum.L.Rev. 1148,

1149-50 (1998) (articulating the classic rule that "F[orum] 2 must inquire into such matters as adequacy of class representation before it can afford full faith and credit to the F[orum] 1 judgment"); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va.L.Rev. 1051, 1170 (1996) ("Th[e] intractable agency problem [in class suits] accounts for the general rule that absent class members are entitled to have a second court rule on whether they were adequately represented in the class suit.").

Important public policy considerations require that the plaintiff addressing due process concerns in the class settlement context should be able to pursue collateral review in his local forum based on the vested interest of class action courts in shielding their settlements against due process challenges. The wisdom of this principle is apparent upon examination of the actual role courts have played when deciding whether to approve a settlement. The literature indicates that courts all too often have had little ability or incentive to ensure that absent class members are treated fairly. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum.L.Rev. 1343, 1348 & n. 14 (1995) (summarizing a study suggesting that "courts have little ability or incentive to resist the settlements that parties in class action litigation reach."); *see also* Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L.Rev. 1045, 1117 n. 334 (1995) ("I think the courts are motivated to find counsel adequate so that the courts may accept settlements and move on to other business."); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.Chi.L.Rev. 1, 45-47 (1991) (explaining why

judges are unlikely to reject a settlement). Hence, judges have a powerful interest in approving a settlement and, consequently, avoiding attacks thereto by absent class members asserting denials of due process rights. Thus, attempts to channel collateral attacks to the rendering court undermine important policy justifications for collateral attack.

B. The Settlement Violates Neil's Constitutional Rights.

Neil's complaint demonstrates that Neil believes that his constitutional rights were violated by the settlement as follows: (i) the settlement worked an unconstitutional taking because Neil received no quid pro quo for his obligation to meet the preset PPH critera; (ii) the settlement did not – and could not – afford Neil with constitutionally adequate notice; (iii) the settlement provided Neil with no meaningful opportunity to opt out; (iv) the settlement's establishment of PPH criteria against future claimants violates the Article III case-or-controversy requirement; and (v) the settlement did not provide Neil with sufficient opportunity to be heard because of the inadequate representation of class counsel.

1. Neil Received No Quid Pro Quo For His Obligation To Meet The Preset PPH Criteria Such That The Settlement Effects An Unconstitutional Taking.

The settlement limits PPH claimants to preset medical criteria in order to prevail in court. However, the settlement provides no exchange for this limitation: it merely "allows" PPH claimants to bring suit outside the

settlement even though the right to a trial is already guaranteed by the U.S. Constitution. Accordingly, the "right" to bring suit outside the settlement does not constitute a quid pro quo for the settlement's restrictions on the claimants' proof.

A chose in action is a property right. *Standard Oil Co. v. State of N.J., By Parsons*, 341 U.S. 428, 439 (1951). By foreclosing Neil's right to present his own evidence of PPH medical criteria while providing no benefit for the restriction, the settlement effected a judicial taking of Neil's property without due process of law in violation of the United States Constitution: "The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969), *re'hrng denied*, 396 U.S. 869 (1969). "[T]he right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Id.* at 428.

Hence, the settlement violates due process by failing to provide PPH claimants an adequate quid pro quo or exchange for giving up the right to offer their own evidence as to the correct medical criteria for PPH. *Cf. Treichler v. State of Wisconsin*, 338 U.S. 251, 70 S.Ct. 1, 94 L.Ed. 37 (1949) (state statute providing for additional inheritance taxes measured by tangible property outside the state offended due process because the state could offer no quid pro quo).

2. The Settlement Did Not – And Could Not – Afford Neil Constitutionally Adequate Notice.

Absent class members must be provided with adequate notice including, if warranted, an opportunity to opt

out of the class. *See, e.g., Shutts*, 472 U.S. at 812. Neil did not receive notice of the class action settlement despite the fact that Neil was identifiable through reasonable effort such that individual notice to him was mandatory under Rule 23. Regardless, had Neil received such notice it is highly questionable as to whether it would have been constitutionally adequate, because Neil did not suffer from PPH until after the settlement.

Due process and Rule 23(c)(2) require that notice be tailored to allow an absent class member to make a rational judgment on whether to exclude himself from the action. Neil, whose PPH claim had not yet come into existence, could not have been given meaningful notice that would have enabled a rational judgment as to whether or not to opt out because he did not know that he might be bound to the settlement's inaccurate PPH criteria. Furthermore, PPH claimants are not allowed – in any way – to opt out of the settlement's PPH criteria.

Until Neil was stricken with PPH, he had no reason to be before any court. And in the absence of due process, he was never properly before any court. A so-called claimant who has no injury cannot make reasonable choices about his claim, no matter what type of notice is given. It was for this reason that the court in *In re Amatex Corp.*, 37 B.R. 613 (E.D. Pa. 1983), *rev'd on other grounds*, 755 F. 2d 1034 (3rd Cir. 1985), concluded that "[n]o genuine or meaningful notice can be given to individuals who cannot know of a future cause of action." *Id.* at 614. The problems of giving notice to a class of unknown persons who are themselves unaware that they are "injured" are insurmountable.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality

is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). At the time the Rule 23(c)(2) notice went out to class members, Neil had not developed PPH and he could not have brought a claim for PPH in a court of law. Neither would Neil have paid attention to this notice even if the defendants had intended the notice to reach him.

Because "futures," have not manifested an injury, it is unlikely that they would pay any attention to a class notice designed to compensate others for injuries they did not share. In *Amchem Products v. Windsor*, 521 U.S. 591, 628 (1997), this Court recognized that effective notice requires knowledge of one's stake in the outcome. Many such individuals may not realize the extent of the harm that they may incur. Even if they appreciate the significance of the class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out. But Neil could not opt out of the settlement's PPH criteria.

3. The Settlement Provided Neil With No Meaningful Opportunity To Opt Out.

In *Phillips Petroleum Co. v. Shutts*, this Court held that absent class members in suits for money judgments must be allowed to exclude themselves. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813-814 (1985). "[T]o satisfy due process, the notice, like any other affecting substantial rights, must be sufficiently informative and give *sufficient opportunity for response*, to satisfy due process." *Kyriazi v.*

Western Elec. Co., 647 F.2d 388, 395 (3rd Cir. 1981) (emphasis added), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Neil was not allowed to "exclude himself" because he is purportedly bound by the PPH criteria set out in the settlement *regardless* of whether he opted out. Due process and Rule 23(c)(2) require that notice be tailored to allow an absent class member to make a rational judgment on whether to exclude himself from the action. It is inconceivable that Rule 23 was intended to encompass such illusory opt-out rights. To the contrary, an opt-out right must be unequivocal, and not partial, in order to satisfy due process. The settlement's attempt to bind PPH claimants to the settlement's PPH criteria, with no alternative to being bound, constitutes an astonishing denial of due process.

4. The Settlement's Establishment Of PPH Criteria Violates The Case Or Controversy Under Article III.

The existence of a real case or controversy is "an irreducible minimum" of the jurisdiction of the federal courts. *Valley Forge Christian College v. Americans United For Separation Of Church And State*, 454 U.S. 464, 471 (1982). Moreover, the parties may not waive the requirement. *Juidice v. Vail*, 430 U.S. 327, 331 (1977). "Future" PPH claimants were inadequately represented in the settlement because they had no case or controversy at the time of the settlement.

"Article III . . . gives the federal courts jurisdiction over only 'cases or controversies,' and the doctrine of standing serves to identify those disputes which are

appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 154-155 (1990). In order for there to be a case or controversy, at the very least there must be a party before the court with the standing to sue. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (standing to sue is "one of the controlling elements in the definition of a case or controversy under Article III").

In order to have standing, a party must show "(1) that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); (2) that the injury "fairly can be traced to the challenged action," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976); and (3) that the injury "is likely to be redressed by a favorable decision." *Id.* at 38. A plaintiff cannot invoke the jurisdiction of a federal court unless he has suffered an injury to himself that is "distinct and palpable." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The absence of a case or controversy in the present circumstance arose from the fact that Neil was bound by pre-set PPH criteria even without a manifested injury. Because Neil had not manifested an injury at the time of the settlement, there was no case or controversy and he did not have a litigable claim.

In *Schweitzer v. Conrail*, 758 F.2d 936 (3rd Cir. 1985), the Third Circuit held that unmanifested injury claims of persons exposed to asbestos could not even be litigated in bankruptcy, because the claims had yet to accrue. In *Ayers v. Jackson Township*, 106 N.J. 557, 583 (1987), a New Jersey court held that claim preclusion could not apply, because the claim could not have been joined with earlier claims, such as property damage or medical monitoring, as it did not accrue until the disease manifested.

There is nothing in Rule 23 that makes it possible for a nonlitigable case to give rise to a binding decree. Furthermore, Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that the rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). *See also* Fed.R.Civ.P. 82 ("rules shall not be construed to extend . . . the [subject-matter] jurisdiction of the United States district courts"). Rule 23 does not change the substantive law of res judicata, which only precludes claims that were litigated or could have been litigated in the prior action. *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946).

5. The Settlement Did Not Provide Neil With Sufficient Opportunity To Be Heard Because He Was Inadequately Represented By Class Counsel.

Based on the foregoing cited cases from this Court, and the Third Circuit, it is apparent that class counsel did not adequately represent Neil. The failure to provide adequate representation left Neil with no protection, deprived him of his claim, and violated his right to due process of law. Far from adequately representing Neil "at all times," "present" class representatives did not represent Neil at any time, and this is demonstrated by the result they obtained for him.

Moreover, the settlement purports to bind future claimants, i.e., those with unmanifested PPH. Attempts by "present" claimants to represent "future" claimants raises due process concerns. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), this Court followed settled law in addressing the inherent conflicts between present and

future claimants. Under *Amchem*, a settlement on behalf of both currently-injured and exposure-only plaintiffs reached by currently-injured plaintiffs cannot be binding on persons who at the time of settlement had not yet manifested injury. *Amchem*'s holding, which expressly followed the intent of the framers of Federal Rule 23, as amended in 1966, was reaffirmed by the this Court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999):

> [I]t is obvious that a class divided between holders of present and future claims (some of the latter involving no physical injury . . .) requires division into homogeneous subclasses under Rule 23(c)(4)(b), with separate representation to eliminate conflicting interests of counsel.

Id. at 854-56.

II. NEIL MEETS THE STANDARDS FOR ISSUANCE OF THE WRIT.

Neil's petition to this Court followed the Third Circuit's denial of his application for a writ of mandamus. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). Neil alleges that the JPML abused its discretion in transferring his case to MDL-1203 and that the Court of Appeals should therefore issue a writ of mandamus directing the JPML to vacate its transfer order or else issue a writ of mandamus or prohibition to the Eastern District of Pennsylvania to remand the case to the Northern District of Alabama or refrain from exercising jurisdiction until a collateral review is concluded.

Although this Court has "not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,'" *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976), this Court has required that petitioners demonstrate a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holand*, 346 U.S. 379 (1953), or conduct amounting to "usurpation of [the judicial] power," *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945), to be entitled to the issuance of the writ.

Neil has met this demanding standard. The JPML plainly acted beyond its "jurisdiction" because 28 U.S.C. § 1407 does not empower the JPML to transfer an action, based on "justice" and "efficiency," to another district for coordinated or consolidated settlement proceedings when an absentee class member, with no nexus to the forum, seeks collateral review of due process violations in the settlement.

In addition, mandamus generally will not issue if another adequate and complete method of relief is available. *U.S. ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 (1937). However, Neil has no adequate and complete alternative remedy available to him. Nevertheless, this rule does not apply where the judgment is void, and a judgment is void where there is no personal jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878). There is no personal jurisdiction in the absence of due process, i.e., notice and an opportunity to be heard.

Neither can the All Writs Act confer jurisdiction where to do so would violate Article III and due process. Under the All Writs Act, 28 U.S.C. § 1651(a), a federal court may

enjoin parties before it from attempting to relitigate decided issues. 28 U.S.C. § 1651 provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) an alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Id. Hence, under the All Writs Act, a court may issue only writs that are in aid of the issuing court's existing jurisdiction; it does not grant new jurisdiction or expand a court's jurisdiction otherwise provided or limited by law. Furthermore, the All Writs Act cannot confer on the courts the power to ignore the case-or-controversy requirement, which is rooted in Article III of the constitution's definition of judicial power. *Valley Forge*, 454 U.S. at 471-761. As this Court stated in *Brown v. Gilmore*, 533 U.S. 1301 (2001):

> "It is established, and our own rules require, that injunctive relief under the All Writs Act is to be used 'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313, 107 S.Ct. 682, 93 L.Ed.2d 692 (1986) (SCALIA, J., in chambers) (quoting *Fishman v. Schaffer*, 429 U.S. 1325, 1326, 97 S.Ct. 14, 50 L.Ed. 2d 56 (1976) (Marshall, J., in chambers)). Such an injunction is appropriate only if "the legal rights at issue are 'indisputably clear.'" 479 U.S., at 1313, 107 S.Ct. 682 (quoting *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 93

S.Ct. 16, 34 L.Ed.2d 64 (1972) (REHNQUIST, J., In chambers)).

Id. at 1303.

Despite these arguments, any other available remedy must be specific and adequate and be equally as beneficial, convenient, and effective as mandamus. *See Marbury v. Madison*, 5 U.S. 137, 173 (1803). Forcing Neil to litigate in a forum he did not choose constitutes significant damage not correctable on appeal. Furthermore, waiting until final appeal is a particularly inadequate remedy because Neil has PPH, a terminal illness, and his health is declining steadily. Clearly, Neil will suffer the ultimate irreparable harm if he dies before his due process concerns can be resolved at the conclusion of a lengthy appellate process.

III. THE COURT SHOULD DIRECT ISSUANCE OF A WRIT APPROPRIATE TO THE CIRCUMSTANCES.

Neil has requested that the JPML's transfer order be vacated and that the Eastern District remand his case to the Northern District of Alabama. Although Neil did not name the JPML as a respondent in the style of his petition for writ of mandamus, the allegations in the body of the mandamus petition clearly demonstrate that the JMPL is a respondent. Neil did name the United States District Court for the Northern District of Alabama as a respondent in the style of his mandamus petition.

Neil asks that, in the event this Court refuses to order the issuance of a writ of mandamus to the JPML based on the fact that the JMPL was not properly named in the style of the mandamus petition, that this Court will order the issuance of the appropriate writ of mandamus or

prohibition to the Eastern District of Pennsylvania ordering remand of the case to the Northern District of Alabama or to refrain from exercising jurisdiction in this case until a collateral review has been concluded. It is within the discretion of the court to treat a petition for a writ of mandamus as one for a writ of prohibition. *See* cases collected at 63C Am.Jur.2d Prohibition § 6. Failing these remedies, Neil asks for leave to amend his mandamus petition to name the JPML in the style of the petition so that justice may be served.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and either (1) a writ of mandamus should be issued directing the Judicial Panel on Multidistrict Litigation to grant Neil's motion to vacate the transfer order, or (2) a writ of mandamus or prohibition should be issued either directing the Eastern District of Pennsylvania to remand Neil's case to the Northern District of Alabama or refrain from exercising jurisdiction until a collateral review is concluded.

Respectfully submitted,

J. GUSTY YEAROUT
Counsel of Record
C. EUGENIA LAMBETH
Attorney for Petitioner
William F. Neil, Jr.

March 15, 2004.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

October 2, 2003
#A-1

No. 03-3883

IN RE: WILLIAM F. NEIL, JR., Petitioner
(Related to E.D. of PA No. 03-cv-20270)

Present: SLOVITER, ROTH and AMBRO, *Circuit Judges*

1. Petition by William F. Neil, Jr. for Writ of Mandamus;

2. Answer to Petition for Writ of Mandamus, received in accordance with the Court's request, from Respondent, Wyeth Ayerst Labs Co. formerly known as American Home Products Corp.

/s/ Gayle Burr
Gayle Burr
Case Manager (267) 299-4921

ORDER

The foregoing petition by William F. Neil, Jr., for Writ of Mandamus is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: December 15, 2003

ghb/cc: Honorable Harvey Bartle, III
J. Gusty Yearout, Esq.
Robert D. Rosenbaum, Esq.
Peter L. Zimroth, Esq.
Arnold Levin, Esq.

DOCKET NO. 1203

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE DIET DRUGS (PHENTERMINE, FENFLURAMINE, DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION

BEFORE WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN, BRUCE M. SELYA,* JULIA SMITH GIBBONS, D. LOWELL JENSEN, J. FREDERICK MOTZ AND ROBERT L. MILLER, JR., JUDGES OF THE PANEL

TRANSFER ORDER

(Filed Aug. 11, 2003)

Before the panel are motions brought, pursuant to Rule 7.4, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), by two of the four plaintiffs in the District of Montana action and all plaintiffs in the 37 other actions listed on the attached Schedule A. These plaintiffs move the Panel to vacate its orders conditionally transferring the actions to the Eastern District of Pennsylvania for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket. In the alternative, several plaintiffs ask the Panel to stay the orders pending rulings on their respective motions to remand to state court. Except with respect to one Southern District of Mississippi action

---

* Judge Selya took no part in the decision of this matter.

(*Johnson*), common defendant Wyeth opposes the motions to vacate and favors inclusion of the actions in MDL-1203.[1]

On the basis of the papers filed and hearing session held, the Panel finds that these 38 actions involve common questions of fact with the actions in this litigation previously transferred to the Eastern District of Pennsylvania, and that transfer of these 38 actions to the Eastern District of Pennsylvania for inclusion in the coordinated or consolidated pretrial proceedings in that district will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The Panel further finds that transfer of these actions is appropriate for reasons expressed by the Panel in its original order, as amended, directing centralization in this docket. The Panel held that the Eastern District of Pennsylvania was a proper Section 1407 forum for actions involving claims of liability related to one or more of the diet drugs phentermine, fenfluramine, or dexfenfluramine. *See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 990 F.Supp. 834 (J.P.M.L. 1998). We note that any motions to remand to state court can be presented to and decided by the transferee court. *See, e.g., In re Ivy*, 901 F.2d 7 (2nd Cir. 1990); *In re Prudential*

[1] On March 11, 2002, American Home Products Corporation changed its name to Wyeth. Wyeth responds on behalf of itself as well as its unincorporated Wyeth-Ayerst Laboratories division; Wyeth Pharmaceuticals, Inc.; Robert L. Scott; and John A. Molnar (collectively Wyeth), in the actions in which they are named as defendants. On August 3, 1998, A.H. Robins Company, Inc., merged into Wyeth and ceased to exist as a separate entity; thus, it is also included in the collective term Wyeth.

Insurance Company of America Sales Practices Litigation, 170 F.Supp.2d 1346, 1347-48 (J.P.M.L. 2001).

Plaintiff in the Northern District of Alabama action argues against transfer of his action, inter alia, that he seeks a declaratory judgment that he is not bound by the MDL-1203 settlement agreement and that the transferee court has no jurisdiction over his claims. We find, however, that such matters are particularly appropriate for resolution by the transferee court. We also find that the distance of the transferor court from the transferee court does not preclude transfer of the two District of Northern Mariana Islands actions presently before the Panel, given that these actions involve the safety and efficacy of the diet drugs at issue in MDL-1203 and, thus, raise common questions of fact with the previously transferred actions. The two objecting plaintiffs in the District of Montana action argue, among other things, that the poor health of one plaintiff, including a diagnosis of primary pulmonary hypertension allegedly caused by her ingestion of the diet drugs in question, and the information already provided to Wyeth weigh against transfer of this action. We find these arguments unpersuasive. To these plaintiffs and any other parties who believe that the uniqueness of their particular situation, the type of their claims, or both render continued inclusion in MDL-1203 unnecessary or inadvisable, we point out that whenever the transferee judge deems remand of any claims or actions appropriate, procedures are available whereby this may be accomplished with a minimum of delay. *See* Rule 7.6, R.P.J.P.M.L., 199 F.R.D. at 436-38.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, these 38 actions are transferred to the Eastern District of Pennsylvania and, with the consent of

that court, assigned to the Honorable Harvey Bartle III for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

FOR THE PANEL:

/s/ Wm. Terrell Hodges
Wm. Terrell Hodges
Chairman

SCHEDULE A

MDL-1203 – In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Products Liability Litigation

Northern District of Alabama

William F. Neil, et al. v. American Home Products Corp., et al., C.A. No. 2:03-75

Eastern District of Arkansas

Charlene Hamilton v. Wyeth, et al., C.A. No. 2:03-43
Thomas Parker v. Wyeth, et al., C.A. No. 3:03-86
Joy Greer v. Wyeth, et al., C.A. No. 3:03-87

Middle District of Florida

Larry Wayne Edwards v. Wyeth, et al., C.A. No. 8:03-631

Northern District of Georgia

Debbie Lindsay, et al. v. Wyeth, Inc., et al., C.A. No. 1:03-275
Ashley Irwin, et al. v. Wyeth, Inc., et al., C.A. No. 1:03-277
Kyra Houston, et al. v. Wyeth, Inc., et al., C.A. No. 1:03-278

Remonia Deloach, et al. v. Wyeth, Inc., et al., C.A. No. 1:03-841

Northern District of Mississippi

Patricia Brown, et al. v. Wyeth, et al., C.A. No. 3:03-29
Lucy Wood, et al. v. American Home Products Corp., et al., C.A. No. 4:03-94
Jamie Woods, et al. v. Wyeth, et al., C.A. No. 4:03-149
Paul Woodcock, et al. v. Wyeth, et al., C.A. No. 4:03-150

DOCKET NO. 1203

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE DIET DRUGS (PHENTERMINE/ FENFLURAMINE/DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION

(SEE ATTACHED SCHEDULE)

CONDITIONAL TRANSFER ORDER (CTO-102)

(Filed Apr. 15, 2003)

On December 10, 1997, the Panel transferred nine civil actions to the United States District Court for the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. Since that time, 3,243 additional actions have been transferred to the Eastern District of Pennsylvania. With the consent of that court, all such actions have been assigned to the Honorable Harvey Bartle III.

It appears that the actions on this conditional transfer order involve questions of fact which are common to the actions previously transferred to the Eastern District of Pennsylvania and assigned to Judge Bartle.

Pursuant to Rule 7.4 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation*, 199 F.R.D. 425, 435-36 (2001), these actions are transferred under 28 U.S.C. § 1407 to the Eastern District of Pennsylvania for the reasons stated in the order of December 10, 1997, (1997 WL 774-929), as amended on January 6, 1998, cited at 990 F.Supp. 834 (J.P.M.L. 1998), and, with the consent of that court, assigned to the Honorable Harvey Bartle III.

This order does not become effective until it is filed in the Office of the Clerk of the United States District Court for the Eastern District of Pennsylvania. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:

/s/ Michael J. Beck
Michael J. Beck
Clerk of the Panel

SCHEDULE CTO-102 – TAG ALONG CASES
DOCKET NO. 1203
IN RE DIET DRUGS (PHENTERMINE/ FENFLURAMINE/DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION

DISTRICT	DIV.	CIVIL ACTION#	
ALABAMA MIDDLE			
ALM	3	03-37	Flessia Bell, et al. v. American Home Products Corp., et al.
ALABAMA NORTHERN			
ALN	2	03-75	William F. Neil, et al. v. American Home Products Corp., et al.
ALN	2	03-81	Lawrence Bates, et al. v. American Home Products Corp., et al.
CALIFORNIA CENTRAL			
CAC	2	03-1366	Lauren Levine, et al. v. American Home Products Corp., et al.
CAC	2	03-1367	Cynthia D. Legassick v. American Home Products Corp., et al.

FLORIDA MIDDLE

FLM	6	03-167	Linda Horton v. American Home Products Corp., et al.
FLM	6	03-198	Sharon Jordan, et al. v. Camall Co., et al.
FLM	8	03-238	Monica Bourgeault v. Wyeth, et al.

GEORGIA NORTHERN

GAN	1	03-275	Debbie Lindsay, et al. v. Wyeth, Inc., et al.
GAN	1	03-276	Phyllis Hodges, et al. v. Wyeth, Inc., et al.
GAN	1	03-277	Ashley Irwin, et al. v. Wyeth, Inc., et al.
GAN	1	03-278	Kyra Houston, et al. v. Wyeth, Inc., et al.
GAN	1	03-311	Williette Neason, et al. v. American Home Products Corp., et al.
GAN	1	03-312	Zanora Ross, et al. v. American Home Products Corp., et al.
GAN	1	03-313	Katie Weaver, et al. v. American Home Products Corp., et al.
GAN	1	03-314	Sherrell Cole, et al. v. American Home Products Corp., et al.
GAN	1	03-315	Lynda Parker, et al. v. American Home Products Corp., et al.
GAN	1	03-316	Charlese Carter, et al. v. American Home Products Corp., et al.

KENTUCKY EASTERN

KYE	0	03-29	Ernestine Withrow v. A.H. Robins Co., Inc., et al.
KYE	7	03-27	Michelle Case v. Wyeth Holdings Corp.

LOUISIANA EASTERN

LAE	2	03-459	Katherine Hegeman, et al. v. Wyeth, et al.
LAE	2	03-460	Flora August, et al. v. Wyeth, et al.

LOUISIANA WESTERN

LAW	2 03-237	Paula Kershenstine v. Wyeth Co., et al.
LAW	5 03-235	Denise A. Ingham, etc. v. Wyeth, Inc., et al.

MISSOURI EASTERN

MOE	4 02-1821	Helen Ahearn v. American Home Products Corp., et al.
MOE	4 02-1824	Corrina Pace v. American Home Products Corp., et al.
MOE	4 02-1825	Patricia Lancos v. American Home Products Corp., et al.
MOE	4 02-1826	Sabrina Robbins, et al. v. American Home Products Corp., et al.
MOE	4 02-1827	Arla Dannheim, et al. v. American Home Products Corp., et al.
MOE	4 02-1828	Hertha Timm, et al. v. American Home Products Corp., et al.
MOE	4 02-1829	Beverly Howard v. American Home Products Corp., et al.
MOE	4 02-1830	Virginia Cavender v. American Home Products Corp., et al.
MOE	4 02-1831	Colleen James, et al. v. American Home Products Corp., et al.
MOE	4 02-1832	Eileen Karius, et al. v. American Home Products Corp., et al.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIAM F. NEIL, JR., individually, and CELESTE C. NEIL, individually,	)	
Plaintiffs,	)	
vs.	)	CV-03-C-0075-S
AMERICAN HOME PRODUCTS CORPORATION; WYETH-AYERST LABORATORIES COMPANY, a division of AMERICAN HOME PRODUCTS CORPORATION; A. H. ROBINS COMPANY, INC., a division of AMERICAN HOME PRODUCTS CORPORATION; GATE PHARMACEUTICALS, INC., a division of TEVA PHARMACEUTICALS U.S.A., INC.; SMITH-KLINE-BEECHAM; and MEDEVA PHARMACEUTICALS, INC., and Fictitious Defendants "A", "B", "C", "D", and "E", whether singular or plural, being those persons, partnerships, corporations, or other legal entities whose wrongful conduct caused or contributed to cause the injuries and damages to the Plaintiffs, all of whose true and correct names are unknown to Plaintiffs at this time, but will be substituted by amendment when ascertained,	)	
Defendants.	)	

COMPLAINT

(Filed Jan. 13, 2003)

COME NOW the plaintiffs, William F. Neil, Jr. (hereinafter "Neil") and Celeste C. Neil, and in support of their claim for relief against the defendants show unto the Court as follows:

PARTIES, JURISDICTION & VENUE

1. Plaintiff William F. Neil, Jr., is over the age of nineteen (19) and is a resident of Jefferson County, Alabama.

2. Plaintiff Celeste C. Neil is over the age of nineteen (19) and is a resident of Jefferson County, Alabama.

3. Defendant American Home Products Corporation ("AHP") is a Delaware corporation that does business in the State of Alabama. At all times relevant to this lawsuit, AHP was engaged in the business of developing, manufacturing, marketing and/or selling Pondimin and Redux in Alabama.

4. Defendant Wyeth-Ayerst Laboratories Company (hereinafter "Wyeth") is a Delaware corporation that does business in Alabama. At all times relevant to this lawsuit, Wyeth was engaged in the business of developing, manufacturing, marketing and/or selling Pondimin and Redux in Alabama.

5. Defendant A. H. Robins Company, Inc. (hereinafter "Robins"), is a Delaware corporation that does business in the state of Alabama. At all times relevant to this lawsuit, Robins was engaged in the business of developing, manufacturing, marketing and/or selling Pondimin and Redux in Alabama.

6. Defendant Gate Pharmaceuticals, Inc., (hereinafter "Gate") is a Delaware corporation that does business in the state of Alabama. At all times relevant to this lawsuit, Gate was engaged in the business of developing, manufacturing, marketing and/or selling Phentermine in Alabama.

7. Defendant Smith-Kline-Beecham is a Pennsylvania corporation that does business in the state of Alabama. Smith-Kline-Beecham, at all times relevant to this lawsuit was engaged in the business of developing, manufacturing, marketing and/or selling the pharmaceutical Phentermine in Alabama.

8. Defendant Medeva Pharmaceuticals (hereinafter "Medeva") is a Texas corporation with its principal place of business in Ft. Worth, Texas. At all times relevant hereto, Medeva was engaged in the business of manufacturing and/or marketing the pharmaceutical Phentermine.

9. Fictitious Defendants "A", "B", "C", "D", and "E", whether singular or plural, are those other persons, firms, corporations, or other entities whose wrongful conduct caused or contributed to cause the injuries and damages to the Plaintiffs, all of whose true and correct names are unknown to Plaintiffs at this time, but will be substituted by amendment when ascertained.

10. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because the case in controversy is between citizens of different states, namely Alabama, New Jersey, Texas, and Pennsylvania, and the matter exceeds the sum or value of seventy-five thousand dollars and no/100 ($75,000.00), exclusive of interest and costs.

11. This Court has jurisdiction over this matter pursuant to Ala. Code (1975) § 6-6-222.

12. Venue is proper in this Court pursuant to Ala. Code (1975)§ 6-3-7.

FACTUAL ALLEGATIONS

13. Plaintiffs reallege and adopt paragraphs 1 through 12 of this complaint as if fully set forth herein.

14. Fenfluramine is an anorectic inducing, weight-loss drug, popularly known as the "fen" half of the drug combination, advertised, promoted, and referred to as "fen/phen." Dexfenfluramine is also an anorectic inducing weight-loss drug prescribed as "Redux." The "phen" half of the "fen/phen" drug combination is the drug prescribed under the name "Phentermine." These drugs have been commonly and regularly prescribed for weight loss.

15. Each defendant herein has actively promoted and/or encouraged the use of Fenfluramine, Dexfenfluramine, and Phentermine (the "drugs"), which are the subject of this lawsuit. In addition, the defendants have conspired to promote the combined use of said drugs so as to increase the sales of each individual drug.

16. The defendants, at all relevant times, have, themselves or through others, manufactured, created, designed, tested, labeled, sterilized, packaged, distributed, supplied, marketed, sold, advertised, and otherwise, distributed the aforementioned drugs.

17. Each of the drugs was widely advertised by the defendants as being effective as a weight control drug. These drugs are chemically related and affect, among other things, brain serotonin levels.

18. The defendants have controlled the design, assembly, manufacture, marketing, and/or sales of said drugs.

19. Beginning in the early 1990's, the defendants marketed and sold these drugs aggressively by misleading potential users about the products and by failing to protect the users from serious dangers which the defendants knew of or should have known about that would result from the use of the aforementioned drugs.

20. The defendants were successful in widely marketing the drugs in the United States. The defendants undertook an advertising scheme which extolled the virtues of the drugs to induce use of the product. The marketing campaign consisted of advertisements, promotional literature placed in the offices of doctors and other healthcare providers, and other promotional materials provided to potential customers. The defendants conspired with each other to suppress the true information about these drugs, and each defendant benefitted from said conspiracy.

21. The advertising program, through the use of affirmative misrepresentations and omissions, falsely and fraudulently sought to create impressions that the use of these drugs, both individually and in combination, were safe for human use, had fewer side affects and adverse reactions than other methods of weight loss, constituted a convenient and safe form of weight loss, and would not interfere with daily life.

22. Each of the defendants purposely downplayed and understated the health hazards and risks associated with the drugs. Through promotional literature, the defendants deceived potential users of the drugs by relaying positive information, including testimonials from satisfied users and by manipulating statistics to suggest widespread acceptability. All the time, however, the defendants downplayed the known adverse and serious side affects [sic]. The defendants falsely and fraudulently withheld relevant information from potential

users and minimized user and prescriber concern regarding the safety of said drugs.

23. In particular, the defendants and the materials the defendants produced, falsely and fraudulently misrepresented a number of facts regarding the drugs, including but not limited to the presence of adequate testing of the drugs and the presence of adequate testing of any combination of these drugs and the severity, frequency, and discomfort or side affects [sic] and adverse health affects [sic] caused by the drugs.

24. Neil was prescribed one or more of the drugs. As such, Neil is a victim of the defendants' manufacture, marketing, promotion, design, distribution, and/or prescription of said drugs. As a result of having consumed the drugs, the [sic] Neil has been harmed, injured, and damaged.

25. The defendants knew the drugs were prescribed in combination and knew or should have known the risk of patients taking such drugs either singularly or in combination with the other aforementioned drugs.

26. On November 18, 1999, defendant American Home Products Corporation entered into a Nationwide Class Action Settlement Agreement (hereinafter "the Settlement") with class counsel to resolve pending and potential legal claims against American Home Products arising from the drugs Pondimin and Redux.

27. Neil received no notice of the Settlement. However, Neil was identifiable as a class member through reasonable effort such that individual notice was mandatory to him under Fed.R.Civ.P. 23.

28. On August 28, 2000, the United States District Court of Pennsylvania entered an Order approving the Settlement as fair, reasonable, and adequate to all class

members. On January 3, 2002, the court granted Final Judicial Approval of the Settlement.

29. In February 2001, Neil's doctor, a pulmonary specialist, diagnosed the [sic] Neil as having Pulmonary Hypertension and/or Primary Pulmonary Hypertension, and concluded that Neil's condition was caused by Neil's ingestion of the defendants' weight-loss drugs. Neil later developed sleep apnea.

30. Even if Neil had received notice of the Settlement, such notice would have been inadequate because Neil did not suffer from Pulmonary Hypertension and/or Primary Pulmonary Hypertension until after the Settlement. Because Neil had not manifested an injury at the time of notice, he could not have been given meaningful notice.

31. Neil now suffers serious personal injury with a significantly shortened life expectancy. Neil's condition was proximately caused by the ingestion of the above-described drugs. Neil is completely disabled from working and has suffered a substantial loss of income and has further suffered significant mental and emotional distress as well as personal limitations.

32. The Settlement does not include claims for Primary Pulmonary Hypertension. The Settlement allows a class member who has a Primary Pulmonary Hypertension claim (as defined in Sections 1.46 and I.53 of the Settlement Agreement) to pursue that claim in court outside the Settlement, whether or not the class member opted out.

33. The Settlement requires that certain causes of pulmonary hypertension be eliminated in order to meet the definition of Primary Pulmonary Hypertension. However, the Settlement's definition of this condition and the relevant factors to be eliminated in reaching

a diagnosis is erroneous. Although significant scientific evidence supports this conclusion, no such evidence was presented by class counsel.

COUNT I
(Declaratory Judgment)

34. Plaintiffs reallege and adopt paragraphs 1 through 33 of this complaint as if fully set forth herein.

35. An actual and justiciable controversy between the parties with adverse interests exists regarding the conclusive effect of the Settlement against Neil.

36. Neil alleges that the Settlement forum lacks personal jurisdiction over him, an absent class member, because the class notice violated Rule 23(c)(2), his right to Due Process and Equal Protection under the Alabama and United States Constitutions, and because the jurisdictional requisite of adequate and vigorous representation was absent in the class litigation and Settlement.

37. Neil alleges that the Settlement Class was certified in violation of Fed.R.Civ.P. 23 in that the requirements of typicality and commonality of issues of fact and law and adequate representation were not met for a settlement-only class pursuant to *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 138 L.Ed.2d 689 (1997).

38. Neil did not appear in the Settlement forum and had no obligation to do so. Neil did not submit to the jurisdiction of the Settlement forum. Neil did not hire the lawyers who served as class counsel in the Settlement.

39. Neil seeks a Declaratory Judgment from the Court that the Settlement has no binding effect against him

and that this Court has jurisdiction over Neil's claims against the defendants.

40. Neil asks this Court to declare the rights or legal relations of the parties with respect to the issues in this case pursuant to Ala. Code (1975) § 6-6-222 *et seq.*

A. <u>The Class Action Notice Violated Rule 23(c)(2) and Due Process.</u>

41. Neil did not receive notice of his right to opt out of the class action settlement. However, Neil was identifiable through reasonable effort so that individual notice to him was mandatory under Rule 23. Thus, lack of individual notice to Neil violated Rule 23 and his right to due process of law.

42. But even though lack of individual notice to Neil violates Rule 23, even if he had received such notice it would have been wholly inadequate because Neil did not suffer from Pulmonary Hypertension and/or Primary Pulmonary Hypertension until after the Settlement. The Settlement Agreement contains standards that must be met to bring a claim for Primary Pulmonary Hypertension by persons who, like Neil, did not know that they are members of the class and had not yet suffered an injury.

43. Due process and Rule 23(c)(2) require that notice be tailored to allow an absent class member to make a rational judgment on whether to exclude himself from the action. This standard was not met here. Persons, including Neil, who were not aware that they had a claim or whose claim may not yet have come into existence cannot be given meaningful notice and their opt out rights are illusory.

44. Individuals, including Neil, whose Pulmonary Hypertension and/or Primary Pulmonary Hypertension had not yet manifested at the time of the Settlement did not know that they would be bound to the criteria for Primary Pulmonary Hypertension delineated in the Settlement. Neil did not have any fen/phen related illness until he was diagnosed in February, 2001, after the opt-out period.

45. Class members, including Neil, who knew of their ingestion of fen/phen but had manifested no Pulmonary Hypertension and/or Primary Pulmonary Hypertension were likely to have paid little attention to class action announcements. Neil was in fine health until he was diagnosed with Pulmonary Hypertension and/or Primary Pulmonary Hypertension (a fatal form of pulmonary hypertension) after the opt-out period closed. Without physical injuries, Neil was not on notice that he gave up causes of action that had not yet accrued.

46. To expect class members, including Neil, who had not yet been diagnosed with Pulmonary Hypertension and/or Primary Pulmonary Hypertension to read, understand, and respond to densely written class action notices dealing with theoretical legal claims that did not yet exist is unreasonable. Indeed, fen/phen ingestion carries with it a relatively low probability of development of Pulmonary Hypertension and/or Primary Pulmonary Hypertension.

47. Even if Neil had received notice and realized he fell within the class definition, he lacked adequate information to properly evaluate whether to opt out of the settlement. Not knowing that he would develop Pulmonary Hypertension and/or Primary Pulmonary Hypertension in the future, the choice of staying in or opting out was no more reasoned or deliberate than placing a bet at the track on a horse that hadn't been

born yet. In this situation, Neil lacked any basis for making an informed decision on whether to remain in the litigation. At best, Neil could only guess whether the proposed settlement would be beneficial or detrimental to his interests.

48. For class members, including Neil, who could not identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, the opt-out right within a court-designated period of time was of no beneficial use. Future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples.

49. Neil did not know that he had a claim, let alone its value, until after the Settlement was concluded. A class action purporting to affect a future claim raises problems of effective notice, adequate representation, litigation management, actual or potential conflicts of interest, legal ethics, and claims administration.

50. A so-called claimant who has no injury cannot make reasonable choices about his claim, no matter what type of notice is given. It was for this reason that the court in *In re Amatex Corp.*, 37 B.R. 613 (E.D. Pa. 1983), rev'd on other grounds, 755 F. 2d 1034 (3d Cir. 1985), concluded that "[n]o genuine or meaningful notice can be given to individuals who cannot know of a future cause of action." *Id.* at 614.

B. Neil Did Not Have An Article III Case Or Controversy At The Time Of The Settlement.

51. Individuals, including Neil, who have no current injury lack standing to pursue their claim in court if they have no damages. They have no justiciable case or controversy within the confines of Article III of the

Federal Constitution. Thus, the Primary Pulmonary Hypertension criteria in the settlement agreement is a nonadversarial endeavor to impose on individuals without currently ripe claims a regime binding on those individuals if and when they manifest injuries.

52. In a class action there must be an injury in fact by everyone, and the absence of a case or controversy here arose from the fact that the Primary Pulmonary Hypertension criteria were set and class members are purported to be bound by that criteria even when they had not manifested an injury such that no case or controversy existed at the time of the settlement. At the time of the settlement, Neil did not suffer from Pulmonary Hypertension and/or Primary Pulmonary Hypertension; therefore, there was no case or controversy and he did not have a litigable claim.

53. There is nothing in Rule 23 that makes it possible for a nonlitigable case to give rise to a binding decree. Furthermore, Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that the rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). See also Fed. R. Civ. Prov. 82 ("rules shall not be construed to extend . . . the [subject-matter] jurisdiction of the United States district courts").

C. The Requirement Of Adequacy of Representation Was Not Met.

54. The Due Process clause of the Alabama and United States Constitutions requires that the class representatives and their counsel adequately represent the interests of the absent class members at all times. In addition to the problems of notice and lack of case or controversy, the lack of information about future

Pulmonary Hypertension and/or Primary Pulmonary Hypertension claimants made adequate representation under Rule 23(a)(4) impossible, because the class representatives could not possibly advocate the interests of persons whose circumstances were not only unknown, but unknowable.

55. In addition, because significant available evidence concerning Pulmonary Hypertension and/or Primary Pulmonary Hypertension was omitted, class representatives and their counsel failed to adequately and vigorously represent class members suffering from these conditions. The failure to provide adequate representation left Neil with no protection, deprived him of his claim, and violated his right to due process of law.

56. Had Neil received notice and been able to opt out, he could have proceeded with additional medical proof and not be bound by the flawed Primary Pulmonary Hypertension criteria based on deficient medical evidence presented by class counsel. Furthermore, because this was a settlement there was no vigorous cross-examination of the medical experts that testified. Thus, Neil was deprived of his right to cross-examine the experts and to hire his own experts.

57. Furthermore, the Settlement unfairly disadvantaged those without currently compensable conditions in that it failed to account for changes, over time, in medical understanding. Causation provisions should keep pace with changing science and medicine, rather than freezing in place the science at the time of the settlement.

58. The inclusion in the Settlement Agreement of scientifically flawed criteria for establishing a Primary Pulmonary Hypertension claim on behalf of those who have not yet been injured has caused the unwitting

holders of such claims to have their causes of action extinguished or compromised without any meaningful choice to protect themselves. These absent class members would thus be bound without due process of law in violation of *Hansberry v. Lee*, 311 U.S. 32 (1940), and its progeny.

D. The Settlement Violates Neil's Rights to Equal Protection.

59. The Equal Protection clause of the Alabama and United States Constitutions requires that equal treatment and fundamental fairness be satisfied, and that persons under like circumstances and conditions be treated alike.

60. Upon information and belief, class counsel entered into settlements with individuals having Pulmonary Hypertension and/or Primary Pulmonary Hypertension prior to the Settlement, and those individuals were not required to meet the Primary Pulmonary Hypertension criteria in the Settlement Agreement. The different standards applied to class members after the Settlement having a claim for Pulmonary Hypertension and/or Primary Pulmonary Hypertension, including Neil, constitutes a violation of the constitutional guarantee of equal protection.

COUNT II
(AEMLD)

61. Plaintiffs reallege and adopt preceding paragraphs 1 through 60 of this complaint as if fully set forth herein.

62. The drugs sold to Neil were in a defective condition and were unreasonably dangerous to Neil as the ultimate user or consumer, as defined under the "Alabama

Extended Manufacturers' Liability Doctrine" ("AEMLD"). At the time the aforementioned drugs left the control of the defendants and/or sellers, the drugs Neil received were defectively designed, manufactured, marketed, and distributed, because, among other defects, the drugs were unreasonably dangerous because, when used in combination, they caused serious heart valve damage, pulmonary hypertension, and other related problems. Neil was using the drugs as the drugs were intended to be used; however, after taking the drugs, and as a result of the drugs' defective condition, Neil sustained dizziness, chest pains, heart palpitations, swelling, shortness of breath, heart valve damage, and/or pulmonary hypertension. Moreover, Neil has been damaged in that the defendants' conduct has resulted in Neil having to have continuous medical monitoring. Said problems were caused by the use of aforementioned drugs.

63. The conduct of each manufacturer or defendant was the proximate or contributing cause of substantial and permanent damage to Neil.

64. Neil has suffered substantial physical injury and mental anguish. Neil also suffers mental anguish from the fear that the defective combination of drugs taken may have caused or contributed to cause permanent physical damage. Neil sues for the physical impairment suffered in the past and that he will suffer in the future, in addition to past physical pain and mental anguish. Neil has sustained medical expenses in the past and will require future medical expenses in order to care for, monitor, and treat the numerous problems he has suffered, and will suffer in the future, as a result of the defective products. Neil has suffered economic injury including the amount paid for the defective drugs.

65. In light of the reasonably available knowledge to them, the defendants knew or should have known at the time the drugs left their control that the drugs and their components had potential to cause harm and danger for which damages are sought herein.

66. The drugs are and were defective due to the defendants' failure to test the drugs adequately before marketing them.

67. The drugs are and were defective in design or formulation in that the drugs were more dangerous than an ordinary consumer would expect and/or the risks associated with the use of the drugs outweighed their utility.

68. The drugs are and were defective due to inadequate warnings because the defendants knew or should have known that the product created a risk of harm to individuals, including Neil, yet the defendants failed to adequately warn of said risk.

69. The drugs are and were defective due to inadequate warnings or instructions due to inadequate product literature.

70. The drugs are and were defective due to inadequate post-marketing warnings or instructions because, after the defendants knew or should have known of the risk of injury from the drugs, the defendants failed to provide an adequate warning to users or consumers of the product.

71. As a proximate result of the defective condition of the drugs, Neil has suffered and will continue to suffer severe harm, damage, and injury as previously described.

COUNT III
(Negligence)

72. Plaintiffs reallege and adopt paragraphs 1 through 60 of this complaint as if fully set forth herein.

73. The defendants had a duty to exercise reasonable care in the design, testing, manufacture, sale, marketing, and/or distribution of the drugs, including a duty to assure that the products did not cause individuals, including Neil, to suffer from unreasonable and dangerous side effects. The defendants failed to exercise such ordinary care and breached said duty.

74. The defendants, among other things, committed negligence as follows:

    (a) Failed to use due care so as to avoid the aforementioned risks to individuals including Neil when the drugs were used;

    (b) Failed to give proper warning regarding all possible adverse side effects associated with the use of the drugs and the comparative severity and duration of such adverse effects;

    (c) Failed to conduct adequate pre-clinical testing, and post-marketing surveillance to determine the safety of the drugs;

    (d) Failed to provide adequate training to medical care providers who prescribed the drugs; and,

    (e) Failed to properly advise the Federal Drug Administration regarding, among other things, the safety of the drugs and the adverse events associated with the drugs.

75. The defendants were careless and negligent in the designing, testing, manufacturing, selling, distributing, merchandising, advertising, promotion, compounding,

packaging, fabrication, analyzing, marketing, and recommendation of the drugs.

76. As a proximate result of the defendants' negligence, Neil has suffered and will continue to suffer severe harm as previously described.

COUNT IV
(Fraud)

77. Plaintiffs reallege and adopt paragraphs 1 through 60 of this complaint as if fully set forth herein.

78. The defendants were engaged in a conspiracy to defraud and mislead. Through concert of action and common design or plan, these defendants acted together to accomplish an illegal purpose.

79. At all times pertinent hereto, the defendants conducted and/or conspired jointly to conduct a sales and marketing campaign to promote the sale of the drugs through advertisements and other promotional literature and fraudulently deceived Neil, physicians, and the general public as to the health risks and consequences of the drugs. These defendants suppressed material facts that if disclosed to Neil would have resulted in Neil's refusal of the drugs.

80. As a proximate contributing cause of defendants' fraudulent conduct, Neil has sustained damages.

COUNT V
(Negligent Misrepresentation)

81. Plaintiffs reallege and adopt paragraphs 1 through 60 of this complaint as if fully set forth herein.

82. The defendants' misrepresentations and suppressions of material facts were done intentionally, willfully,

and/or negligently. In reliance of the foregoing misrepresentations by these defendants, Neil was induced to and did purchase the drugs and subjected himself to these drugs. If Neil had known of the true facts, he would not have taken such action and subjected himself to the aforesaid risks.

83. As a proximate result of these defendants' negligent, false, and fraudulent misrepresentations, fraudulent suppression and concealment, and conspiracy, Neil has suffered harm, injuries, and damages.

COUNT VI
(Breach of Warranty)

84. Plaintiffs reallege and adopt paragraphs 1 through 60 of this complaint as if fully set forth herein.

85. The defendants have impliedly and expressly warranted to Neil that the drugs were safe when, in fact, the products were not safe for all foreseeable uses. Each of the defendants were negligent for distributing a defective product without providing adequate warnings and without first determining that the products were safe for all applicable foreseeable uses.

86. As a proximate result of the breaches of express and/or implied warranty, Neil has suffered and will continue to suffer harm and damages as alleged herein.

COUNT VII
(Conspiracy)

87. Plaintiffs reallege and adopt paragraphs 1 through 86 of this complaint as if fully set forth herein.

88. The defendants acted in concert to promote the combined use of the drugs. This has as its goal,

among other things, to maximize the sales of the specific drug manufactured by each defendant. Defendants' conduct constituted a civil conspiracy resulting in all defendants being liable for the damages sustained by Neil.

COUNT VIII
(Loss of Consortium)

89. Plaintiffs reallege and adopt paragraphs 1 through 88 of this complaint as if fully set forth herein.

90. As a proximate result of the Defendants' conduct as alleged herein, Plaintiff Celeste C. Neil was caused to suffer the loss of consortium, companionship, aid, assistance, comfort and society of her lawful spouse, Neil.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Plaintiffs respectfully requests that the Court provide the following relief:

(a) that this Court shall take jurisdiction of this matter;

(b) that this Court shall declare the rights, duties, obligations, status and legal relations of the Neil and defendant under the Settlement;

(c) that this Court shall declare that the Settlement violates Neil's rights to Due Process and Equal Protection under the Alabama and United States Constitutions;

(d) that this Court shall declare that the Settlement Class was certified in violation of Fed.R.Civ.P. 23 for lack of typicality and commonality of questions

of fact and law, and for inadequate representation;

(e) that this Court shall declare that the Settlement is invalid as to Neil's claims for Pulmonary Hypertension and/or Primary Pulmonary Hypertension;

(f) that this Court shall declare that Neil is not bound by the definition of Primary Pulmonary Hypertension and related factors to be eliminated per the Settlement, and may present additional scientific evidence as to the diagnosis and cause of Pulmonary Hypertension and/or Primary Pulmonary Hypertension including, but not limited to, the relationship of sleep apnea to Primary Pulmonary Hypertension;

(g) that this Court shall grant compensatory and punitive damages in an amount to be decided by the trier-of-fact, for the injuries previously set forth in the complaint.

(h) that this Court grant such further, other and different relief to which Plaintiffs may be entitled.

/s/ J. Gusty Yearout
J. Gusty Yearout
Attorney for Plaintiff

/s/ C. Eugenia Lambeth
C. Eugenia Lambeth
Attorney for Plaintiff

OF COUNSEL:
YEAROUT & TRAYLOR, P.C.
800 Shades Creek Parkway, Ste. 500
Birmingham, Alabama 35209
(205) 414-8160

PLAINTIFF DEMANDS A TRIAL BY A JURY OF HIS PEERS

/s/ J. Gusty Yearout
Of Counsel

SERVE DEFENDANTS VIA CERTIFIED MAIL:

American Home Products Corporation
5 Giralda Farms
Madison, New Jersey
07940-0874

Wyeth-Ayerst Laboratories Company
Registered Agent:
Prentice-Hall Corporation Systems
319 Market Street
Harrisburg, PA 17101

A. H. Robins Co., Inc.
5 Giralda Farms
Madison, New Jersey
07940-0874

Gate Pharmaceuticals, Inc.
650 Cathill Road
Sellersville, PA 18960

Smith-Kline-Beecham
One Franklin Plaza
Philadelphia, PA 19101

Medeva Pharmaceuticals, Inc.
Registered Agent:
CT Corporation Systems
350 N. St. Paul
Dallas, TX 75201

UAB SCHOOL OF
MEDICINE
Department of Medicine

January 15, 2002

Mr. Gusty Yearout
Yearout, Myers and Traylor
Attorneys at Law
800 Shades Creek Parkway; Suite 500
Birmingham, AL 35209

I, David Weill, am Board Certified in Internal Medicine and Pulmonary Medicine and am Medical Director of the Lung Transplant Program at the University of Alabama at Birmingham. My practice involves the care and management of end stage lung disease including pulmonary hypertension. I am very familiar with the diagnosis of primary pulmonary hypertension and its management. Please find attached my curriculum vitae for your review. I had the opportunity to review the records and examine Mr. William Neil. He is a 52 year old gentleman who has a diagnosis of primary pulmonary hypertension made by a right heart cardiac catheterization in February of 2001. At that time he was symptomatic with severe shortness of breath. Please find enclosed a copy of that catheterization report. The right heart catheterization revealed a pulmonary artery pressure of 54/18 which would indicate a pulmonary artery mean pressure greater than 25 at rest. This is consistent with the diagnosis of pulmonary hypertension. The patient at that time had no other clear secondary causes for pulmonary hypertension. He did subsequently have a sleep study in 10/01 which indicated obstructive sleep apnea, however, at the time of the original right heart catheterization the patient had no symptoms compatible with obstructive sleep apnea. He

also took combination Phentermine and Fenfluramine from 1996 to 1997 for a total of eight to nine months and he also took Redux medication during that time.

Given that Mr. Neil's pulmonary hypertension developed prior to the onset of symptoms for sleep apnea I can conclude that the patient's pulmonary hypertension was caused by his anorectic medication use. It is quite possible that the sleep apnea further exacerbated his pulmonary hypertension but it is likely that the anorectic medications were a principle factor in its development.

Should you have any questions about my evaluation please feel free to contact me.

Warm regards.

/s/ David Weill

David Weill, M.D.
Medical Director, UAB Lung
Transplant Program
Associate Professor of Medicine

DW:ca

Division of Pulmonary, Allergy,
and Critical Care Medicine
215 Tinsley Harrison Tower
1900 University Boulevard
205.934.5400
Fax 205.934.1721

The University of
Alabama at Birmingham
Mailing Address:
THT 215
1530 3RD AVE S
BIRMINGHAM, AL
35294-0006

(2)

Supreme Court, U.S.
FILED
APR 19 2004
OFFICE OF THE CLERK

No. 03-1316

IN THE

Supreme Court of the United States

WILLIAM F. NEIL, JR.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT WYETH'S BRIEF IN OPPOSITION

PETER L. ZIMROTH*
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022
(212) 715-1010

* *Counsel of Record*

ROBERT D. ROSENBAUM
SARAH M. BRACKNEY
ARNOLD & PORTER LLP
555 Twelfth Street NW
Washington, DC 20004
(202) 942-5862

Attorneys for Respondent Wyeth

186993

CP
BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit properly denied mandamus to overturn the Judicial Panel on Multidistrict Litigation's routine transfer of Petitioner's federal court civil action under Section 1407 of Title 28 of the U.S. Code (the "Multi-District Litigation Statute").

PARTIES TO THE PROCEEDING BELOW

Respondent Wyeth incorporates by reference Petitioner's list of parties to the proceedings below. Petitioner named American Home Products Corporation ("AHP"), Wyeth-Ayerst Laboratories Company ("Wyeth-Ayerst"), and A.H. Robins Company ("Robins") as defendants in his civil action and as Respondents in this Court. On March 11, 2002, AHP changed its name to Wyeth. On August 3, 1998, Robins was merged into AHP and ceased to exist as a separate entity. On June 30, 2001, Wyeth-Ayerst merged with and into a wholly owned subsidiary of Wyeth.

STATEMENT PURSUANT TO RULE 29.6

Respondent Wyeth has no parent company, and no publicly held company owns more than 10% of Wyeth's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. Background of the MDL Proceedings and of the Class Action Settlement	4
B. Procedural History of Petitioner's Claims	6
REASONS FOR DENYING THE PETITION	9
I. PETITIONER CONCEDES THAT HE NEVER ARGUED TO THE COURT OF APPEALS THAT THE JPML LACKED STATUTORY AUTHORITY TO TRANSFER HIS ACTION, AND HE MAY NOT NOW ADVANCE THAT ARGUMENT HERE	9

Contents

Page

II. DENIAL OF MANDAMUS WAS APPROPRIATE BECAUSE PETITIONER FAILED TO DEMONSTRATE THAT THE JPML HAD EXCEEDED ITS AUTHORITY 10

III. IT WOULD BE INEFFICIENT TO REVIEW AN INTERLOCUTORY ORDER DENYING MANDAMUS ON THE ISSUE OF WHICH FEDERAL COURT SHOULD HEAR THIS CASE 11

IV. THERE ARE NO EXTRAORDINARY CIRCUMSTANCES HERE JUSTIFYING INTERLOCUTORY REVIEW BY THIS COURT 12

A. The JPML's Transfer Order Was a Routine Exercise of Its Powers 12

B. The JPML's Transfer Decision Was Clearly Correct 13

V. PETITIONER'S STATUTORY AUTHORITY ARGUMENT, IN ANY EVENT, IS BASED ON A FAULTY PREMISE, BECAUSE PETITIONER'S CONSTITUTIONAL RIGHTS ARE IN NO WAY INFRINGED BY THE JPML'S TRANSFER 14

Contents

Page

VI. THE MERITS OF PETITIONER'S COLLATERAL ATTACK WERE NOT BEFORE THE COURT OF APPEALS AND ARE NOT BEFORE THIS COURT 18

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Cases *Page*

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) ... 9

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 10

Gen. Tire & Rubber Co. v. Watkins, 373 F.2d 361 (4th Cir. 1967) 17

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 11

Hansberry v. Lee, 311 U.S. 32 (1940) 15

In re Agent Orange Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) 16

In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993) 12-13

In re Antibiotic Drugs, 320 F. Supp. 586 (J.P.M.L. 1970) 13

In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004) 16

In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 990 F. Supp. 834 (J.P.M.L. 1998) 4

Cited Authorities

Page

In re Diet Drugs Prods. Liab. Litig., MDL 1203, No. Civ.A. 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) 5, 6, 18, 19

In re Diet Drugs, MDL 1203, No. Civ.A. 99-20593, 2002 U.S. Dist. LEXIS 20323 (E.D. Pa. Oct. 8, 2002) 14

In re Diet Drugs, No. Civ.A. 99-20593, 2003 WL 22669132 (E.D. Pa. Oct. 14, 2003) 14

In re Ivy, 901 F.2d 7 (2d Cir. 1990) 10, 18

In re Prudential Ins. Co. of Am. Sales Practices Litig., 314 F.3d 99 (3d Cir. 2002) 12, 13

In re Real Estate Title & Settlement Services Antitrust Litigation, 869 F.2d 760 (3d Cir. 1989) 17

In re Regents of the Univ. of Cal., 964 F.2d 1128 (Fed. Cir. 1992) 17

Kerr v. United States District Court, 426 U.S. 394 (1976) 10

Lockerty v. Phillips, 319 U.S. 182 (1943) 15

Mallard v. United States District Court, 490 U.S. 296 (1989) 17

Cited Authorities

Page

Martin v. Wilks, 490 U.S. 755 (1989) 15-16

Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) . 9

Phillips Petroleum Co. v. Shutts, 492 U.S. 797 (1985) 15, 17

Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) 10

Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001) 13

United States v. Grinnell Corp., 384 U.S. 563 (1966) 16

Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) ... 10

United States Constitution

U.S. Const. art. III, § 1 ..... 3, 15

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1407 ..... i, 4, 12

28 U.S.C. § 1407(a) 2, 15

28 U.S.C. § 1407(e) ..... *passim*

Cited Authorities

Page

Rules

Supreme Court Rule 10(a) 12

Supreme Court Rule 14.1(a) 9

Supreme Court Rule 15.2 ..... 8, 18

There is no good reason to grant the petition for certiorari in this case. Petitioner seeks to overturn an order of the Judicial Panel on Multidistrict Litigation (the "JPML") transferring his civil action against Wyeth from the Alabama federal court in which Petitioner filed the action to the federal court that has presided over a multi-district litigation proceeding for more than six years (the "MDL Court"). Petitioner sought in his complaint, among other things, a declaration that he was not barred from pursuing damage claims against Wyeth by a class action settlement agreement. He asked the Alabama federal court to enjoin the JPML's transfer of his action to the MDL Court, arguing that he had a constitutional right to collaterally attack that settlement in the Alabama court, although none of the authorities on which he relies supports that argument. The Alabama court refused to enjoin the transfer. Petitioner then made the same argument to the JPML, but it too rejected his argument, finding instead that Petitioner's collateral attack could be resolved most efficiently by the MDL Court. That transfer order is reviewable only by extraordinary writ, 28 U.S.C. § 1407(e), so Petitioner sought such a writ from the United States Court of Appeals for the Third Circuit. That court denied his petition without opinion.

The Petitioner now seeks certiorari based on an argument he concedes he never advanced before the Court of Appeals, namely that the Multi-District Litigation Statute should be interpreted to preclude the transfer of his case. This Court should decline to hear such a new argument. Because he never argued to the Court of Appeals that the JPML was acting outside of its authority, well-established principles would have made it inappropriate for the Court of Appeals to have granted such a writ, and well-established principles make it inappropriate for this Court to grant review in this case.

In any event, it would be inefficient for this Court to review the interlocutory order at issue here. The JPML's transfer was a routine and clearly correct exercise of its authority. Moreover, there is no conflict between the circuits relating to Petitioner's argument that he has a constitutional right to litigate his collateral attack in the federal court of his choosing. Indeed, there is no authority in any circuit upholding the existence of such a right.

Petitioner's arguments are clearly without merit and do not deserve this Court's attention.

OPINIONS BELOW

Respondent Wyeth incorporates by reference Petitioner's statement of opinions and judgments below.

STATEMENT OF JURISDICTION

The Judicial Panel on Multidistrict Litigation had jurisdiction to transfer Petitioner's civil action under 28 U.S.C. § 1407(a). The Court of Appeals for the Third Circuit had jurisdiction over the petition for mandamus under 28 U.S.C. § 1407(e). This Court's jurisdiction arises under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 1407(a):

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any

district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. § 1407(e):

No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. . . . Petitions for extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district.

U.S. Constitution, Article III, § 1:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

STATEMENT OF THE CASE

A. Background of the MDL Proceedings and of the Class Action Settlement

On December 10, 1997, the JPML established a multi-district litigation proceeding, MDL Docket No. 1203, in the United States District Court for the Eastern District of Pennsylvania (the "MDL Court"), to administer on a pretrial basis all actions pending in the federal courts claiming injury from the use of Wyeth's prescription diet drugs Pondimin or Redux (the "Diet Drugs"). *See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834 (J.P.M.L. 1998) (amended order). The JPML determined that the cases raised common questions and that the transfer of such Diet Drug cases to one district for coordinated and consolidated pretrial proceedings under Section 1407 of Title 28 of the U.S. Code (the "Multi-District Litigation Statute") would be convenient for the parties involved and promote the just and efficient conduct of the litigation. *See id.* at 835-36. The MDL 1203 docket was assigned to the Honorable Louis C. Bechtle. *Id.* at 836. Since that time, the JPML has transferred thousands of diet drug actions to the MDL Court as "tag-along" cases from judicial districts throughout the nation.

In November 1999, after extensive litigation, Wyeth entered into a Nationwide Class Action Settlement Agreement (the "Settlement Agreement") with a class consisting primarily of all persons in the United States who had ingested the Diet Drugs. Wyeth agreed to pay up to $3.75 billion to resolve the claims of the almost six million class members. Judge Bechtle approved the Settlement Agreement on August 28, 2000, finding it to be fair, adequate, and reasonable.

See In re Diet Drugs Prods. Liab. Litig., MDL 1203, No. Civ.A. 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (order approving settlement).

Class Members had asserted claims for a wide variety of injuries allegedly arising from the use of the Diet Drugs, but there has never been any medical evidence to support such claims except with respect to two diseases, valvular heart disease ("VHD") and primary pulmonary hypertension ("PPH"). The Settlement Agreement provided extensive benefits relating to VHD, in light of the epidemiological evidence indicating there would be a large number of users of these drugs who might have that condition. PPH, however, is a very rare condition, although it is often fatal. While the Settlement Agreement compromised, settled and released all claims by Class Members, other than those who exercised an available opt-out right, the Settlement Agreement did not settle, compromise or release any claims based on PPH. Even if they did not opt out of the settlement class, Class Members were permitted to assert claims based on PPH. In order to identify Class Members who were entitled to assert such claims, the Settlement Agreement defined PPH. As the MDL Court found in approving the Settlement Agreement, based on the expert testimony at the fairness hearing, "the definition of PPH included in the Settlement Agreement is over-inclusive in that the Settlement Agreement definition allows a class member with an 'exceedingly mild case' of PPH to maintain an action against [Wyeth] on the basis of his or her PPH claim." *Id.* at *30.[1] Contrary to Petitioner's

1. Moreover, because PPH is a progressive condition which gets worse over time, the Settlement Agreement gave a benefit to PPH claimants by prohibiting Wyeth from asserting that the statute of limitations had begun to run on those claims before the claimant's condition met the Settlement Agreement's PPH definition. *Id.* at *31.

assertions, however, Class Members who opted out of the settlement class were free to assert any claim, including an alleged PPH claim not meeting that definition.

The MDL Court retained continuing and exclusive jurisdiction over the class action "to administer, supervise, interpret and enforce the Settlement in accordance with its terms." *Id.* at *72. That Court also entered an anti-suit injunction, barring Class Members who did not opt out of the class from asserting or prosecuting any claims barred by the Settlement Agreement. *See id.* at *71.

Judge Bechtle continued to oversee the Settlement Agreement and the multi-district litigation until June 2001, when he retired from the bench. He was succeeded by the Honorable Harvey J. Bartle, III.

B. Procedural History of Petitioner's Claims

Petitioner did not timely opt out of the settlement class. Nevertheless, on or about September 13, 2001, he filed a complaint against Wyeth (the "First Action") in the United States District Court for the Northern District of Alabama, alleging that, as a consequence of ingesting the Diet Drugs, he had developed "pulmonary hypertension."[2] On February 12, 2002, the JPML transferred that action to the MDL 1203 proceedings because the action involved common questions of fact with other cases in those proceedings. Petitioner had objected to transfer on the ground that his claims were allegedly not barred by the Settlement Agreement, which Wyeth disputed. The JPML observed that

2. Petitioner asserts that he filed his original complaint in the state court for Jefferson County, Alabama, *see* Pet. at 2, but that is not so.

the disagreement concerning whether Petitioner's claims would be precluded by the Settlement Agreement made his case "particularly appropriate for resolution by the transferee court." After Wyeth had requested Petitioner's medical records to determine whether Petitioner's claim was based on PPH as defined in the Settlement Agreement, and therefore not precluded thereby, Petitioner chose to dismiss his First Action without prejudice.

On January 13, 2003, Petitioner refiled his claims, again in the United States District Court for the Northern District of Alabama (the "Second Action"). *See* App. at 11-32. In the Second Action, Petitioner alleged that he had been diagnosed with "pulmonary hypertension and/or primary pulmonary hypertension" as a result of taking the Diet Drugs. Petitioner also expressly asserted that he was not bound by the Settlement Agreement because he had not received adequate notice; that the Settlement Agreement was not fair, reasonable, or adequate; and that he was not adequately represented in the negotiation of the Settlement Agreement. He requested a declaratory judgment that he was not bound by the Settlement Agreement, plus compensatory damages for his alleged pulmonary hypertension.

Petitioner then filed a motion with the District Court for the Northern District of Alabama to enjoin the JPML's transfer of the Second Action to the MDL 1203 proceedings, arguing that he had a constitutional right to litigate his collateral attack on the Settlement Agreement in that court, without regard to the Multi-District Litigation Statute. That motion was denied on June 23, 2003, without opinion. In addition, Petitioner filed with the JPML an objection to such a transfer, making there essentially the same argument. The JPML concluded, however, that the issues raised in the

Second Action were "particularly appropriate for resolution by the transferee court," App. at 4, denied Petitioner's motion and transferred the case to the MDL Court.

Petitioner then filed a petition for writ of mandamus with the United States Court of Appeals for the Third Circuit, pursuant to Section 1407(e) of Title 28, seeking to vacate the JPML's transfer order and return his case to the Northern District of Alabama. He argued that transfer was not "just" because it supposedly violated his right to collateral review in his own forum and that transfer was not "efficient" because the MDL Court could not properly decide his collateral attack. The Court of Appeals denied the mandamus petition without opinion.

Petitioner filed his petition for writ of certiorari seeking review of that denial of mandamus.[3]

---

3. In that petition, Petitioner makes a number of statements concerning his medical condition and the diagnosis he has received. Pet. at 2. None of those statements is relevant to his petition, but in light of Supreme Court Rule 15.2, Wyeth points out that those statements are incorrect in the following respects. Petitioner states that he was examined by Dr. David Weill in February 2001, but the medical records available to Wyeth indicate that Petitioner was instead examined at that time by Dr. Oksana Senyk, a different pulmonologist. Petitioner states that Dr. Weill diagnosed him as having PPH, but Dr. Weill's letter, App. at 33-34, does not so state, referring instead to a prior diagnosis, apparently that of Dr. Senyk. *See* App. at 33. However, it appears from the medical records available to Wyeth that Dr. Senyk believed that Petitioner's pulmonary hypertension was caused by sleep apnea, which would mean he does not have PPH. In addition, while Dr. Weill states that sleep apnea symptoms developed after the Petitioner's pulmonary hypertension, the information currently available to Wyeth at least raises doubts about that factual sequence.

REASONS FOR DENYING THE PETITION

I. PETITIONER CONCEDES THAT HE NEVER ARGUED TO THE COURT OF APPEALS THAT THE JPML LACKED STATUTORY AUTHORITY TO TRANSFER HIS ACTION, AND HE MAY NOT NOW ADVANCE THAT ARGUMENT HERE

Petitioner concedes that he argues here for the first time that the Multi-District Litigation Statute does not authorize the transfer of a collateral attack on a class action settlement. Pet. at 5-6. To the JPML and to the Third Circuit Court of Appeals, Petitioner had only argued that it was an abuse of the JPML's discretion to transfer his action to the MDL Court in light of his alleged constitutional right to litigate his collateral attack in the federal court of his choosing. This Court should not consider this attempt to obtain review of the Court of Appeals' denial of mandamus on grounds never argued to that court. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

Seeking to overcome that fatal defect in his petition, Petitioner argues that Supreme Court Rule 14.1(a), which he miscites as Rule 21.1(a), permits certiorari petitions to raise new issues not raised in the court below if those issues are fairly included in the question presented in the petition for certiorari. That rule provides that the question presented in a petition for certiorari is "deemed to comprise every subsidiary question fairly included therein." Petitioner's reading of that rule would open the door to every petitioner to bootstrap himself into new arguments never raised below, contrary to well-established policy. *See Pa. Dep't. of Corr.*, 524 U.S. at 212-213. The effect of the quoted language is

quite different, however: it merely provides that, if the petition is granted, the Court will consider arguments about subsidiary issues fairly included in the question on which certiorari was granted.

II. DENIAL OF MANDAMUS WAS APPROPRIATE BECAUSE PETITIONER FAILED TO DEMONSTRATE THAT THE JPML HAD EXCEEDED ITS AUTHORITY

Congress expressly proscribed review of JPML transfer orders except by extraordinary writ. 28 U.S.C. § 1407(e). Only exceptional circumstances rising to a judicial usurpation of power justify issuance of such a writ. *See, e.g., Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). Such a writ has been traditionally used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (citations omitted). *See generally id.* at 26-31. The JPML has broad discretion in making transfer decisions, but mandamus may not be used to review such discretionary acts. A litigant seeking mandamus must demonstrate that he has a "clear and indisputable right" to the relief. *See Kerr*, 426 U.S. at 403. "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (plurality opinion)). The exercise of discretion "ought not to be overridden by a writ of mandamus." *Calvert Fire*, 437 U.S. at 665; *see also In re Ivy*, 901 F.2d 7, 10 (2d Cir. 1990) (denying mandamus to overturn a JPML transfer order and declining to determine jurisdictional issue as inappropriate on a petition for writ of mandamus).

The Court of Appeals here properly denied mandamus under these circumstances. Petitioner concedes that he did not argue to the Court of Appeals that the JPML had exceeded its statutory authority. He merely argued that the JPML had erred in determining, within its discretionary authority, that transfer would promote the just and efficient conduct of his action. But mandamus provides no remedy for any such error.

III. IT WOULD BE INEFFICIENT TO REVIEW AN INTERLOCUTORY ORDER DENYING MANDAMUS ON THE ISSUE OF WHICH FEDERAL COURT SHOULD HEAR THIS CASE

This Court should not use its limited resources to review at this stage of the litigation which federal court will hear and determine Petitioner's collateral attack on the Settlement Agreement. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory orders inappropriate for certiorari).

The transfer of Petitioner's Second Action did not deprive him of whatever right he has to litigate his due process arguments. If he is successful on those arguments in the MDL Court, he will be allowed to pursue his claims against Wyeth, and his action will ultimately be remanded for trial to the forum of his choice, the Northern District of Alabama. If he is unsuccessful in litigating his collateral attack on the Settlement Agreement, however, he will be entitled to appeal the dismissal of his action to the United States Court of Appeals for the Third Circuit and then to petition this Court for certiorari to review that determination, as well as the alleged impropriety of transfer.

By that time, the factual record on which Petitioner bases his arguments would have been fleshed out, unlike the present record consisting of little more than his own unsubstantiated allegations of such matters as his medical condition and when that condition was first manifested and how it has been diagnosed. And the Court of Appeals will have provided an opinion explaining its reasoning.

It would accordingly be inefficient for this Court to grant certiorari at the present time to review the interlocutory order denying mandamus solely concerning the transfer order.

IV. THERE ARE NO EXTRAORDINARY CIRCUMSTANCES HERE JUSTIFYING INTERLOCUTORY REVIEW BY THIS COURT

A. The JPML's Transfer Order Was a Routine Exercise of Its Powers

The JPML's transfer and the Court of Appeals' denial of mandamus were clearly correct and not such a departure "from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), as to warrant the exercise of this Court's supervisory power.

When common issues arise in actions filed in multiple judicial districts, the purposes of the Multi-District Litigation Statute are properly fulfilled by effecting a transfer to a single district court in order to provide for efficiency and consistency of resolution of those issues. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 314 F.3d 99, 105 (3d Cir. 2002) (allowing collateral attacks in other courts would undermine Congress' purposes underlying 28 U.S.C. § 1407); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d

1425, 1432 (2d Cir. 1993) (a right to collateral attack a class action settlement in the plaintiff's chosen forum does not overrule the Multi-District Litigation Statute, among other forum-shifting doctrines). The case law uniformly supports such transfers, and no circuit court has held that the JPML lacks statutory authority to effect such transfers or that such transfers violate due process rights. Indeed, the JPML has routinely transferred collateral attacks pending in the federal system to the district court overseeing the related multi-district litigation and class action settlement agreement. *See, e.g., In re Prudential*, 314 F.3d at 102 (collateral attacks transferred by JPML); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 254-56 (2d Cir. 2001) (collateral attacks transferred for pretrial purposes); *In re Antibiotic Drugs*, 320 F. Supp. 586, 590-91 (J.P.M.L. 1970) (collateral attacks should be transferred to avoid conflicting rulings). Nothing about this case departs from that accepted and usual course of proceedings.

B. The JPML's Transfer Decision Was Clearly Correct

The JPML correctly determined that the MDL Court was the most appropriate court to hear and determine Petitioner's collateral attack on the Settlement Agreement. *See* App. at 4. The MDL Court is the court most familiar, for example, with the complex medical evidence relating to PPH; the substantial difference between PPH and forms of pulmonary hypertension which are not PPH; the absence of any evidence of a causal connection between the Diet Drugs and forms of pulmonary hypertension not meeting the Settlement Agreement's PPH definitional criteria; and the background of the drafting of the Settlement Agreement's PPH definition to distinguish between true PPH and those other forms of pulmonary hypertension.

In addition, the MDL Court has heard and determined on prior occasions challenges to the adequacy of representation of Class Members claiming to have pulmonary hypertension that does not meet the Settlement Agreement's definition of PPH, the very issue raised in Petitioner's Second Action. The MDL Court rejected those arguments as without merit. *See, e.g.*, *In re Diet Drugs*, MDL 1203, No. Civ.A. 99-20593, U.S. Dist. LEXIS 20323, at *8-*11 (E.D. Pa. Oct. 8, 2002) (enjoining Class Members with pulmonary hypertension not meeting the Settlement Agreement's PPH definition from suing Wyeth and rejecting their argument that they had been inadequately represented); *In re Diet Drugs*, No. Civ.A. 99-20593, 2003 WL 22669132, at *1-*2 (E.D. Pa. Oct. 14, 2003) (rejecting a collateral attack brought by Class Members having pulmonary hypertension not meeting the Settlement Agreement's PPH definition). An appeal from that latter ruling is currently pending before the United States Court of Appeals for the Third Circuit.

Transfer of Petitioner's Second Action to the MDL Court accordingly serves the purposes of efficiency and consistency that underlie the Multi-District Litigation Statute.

V. PETITIONER'S STATUTORY AUTHORITY ARGUMENT, IN ANY EVENT, IS BASED ON A FAULTY PREMISE, BECAUSE PETITIONER'S CONSTITUTIONAL RIGHTS ARE IN NO WAY INFRINGED BY THE JPML'S TRANSFER

In an effort to elevate a routine transfer order into a supposed violation of constitutional rights, Petitioner argues that he has a constitutional right to litigate a collateral attack on the Settlement Agreement in whatever federal court he unilaterally chooses, without regard to the statutes governing the federal courts. No court has so held.

Implicit in Congress' constitutional authority to create and administer the lower federal courts, U.S. Const. art. III, § 1, is the authority to establish their respective jurisdictions and to establish mechanisms by which disputes in those courts can be resolved most efficiently. *See, e.g., Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). The Multi-District Litigation Statute is a proper exercise of that power, designed to facilitate the just and efficient resolution of related disputes arising in different federal courts. The terms of the statute explicitly empower the JPML to transfer cases when it determines that doing so will serve "the convenience of the parties" and "the just and efficient conduct" of the action. 28 U.S.C. § 1407(a).

Petitioner claims, however, that the Multi-District Litigation Statute must be read to create an exception for his suit because, he says, an absent class member has the constitutional right to collaterally attack a class action judgment in the federal court of his choosing. But none of the authorities he cites can fairly be read to support the existence of such a right. *Phillips Petroleum Co. v. Shutts*, 492 U.S. 797 (1985), merely held that a state court judgment may bind an absent class member who had the right to opt out of the class, even if that party otherwise lacked minimum contacts with that state. *See id.* at 811-12. *Shutts* did not even address the forum in which a collateral attack could be made, much less the issue raised here concerning Congress' authorization of a transfer between two federal courts. The other cases cited by Petitioner similarly address the availability of collateral attacks under some circumstances, but not the forum in which those attacks may be brought. *See Hansberry v. Lee*, 311 U.S. 32 (1940) (collateral attack permitted when non-party sought to be bound by prior judgment despite inadequate representation); *Martin v. Wilks*,

490 U.S. 755 (1989) (right of non-party to a consent decree to sue for discrimination without being barred by decree).

Moreover, while Petitioner cites authority that a court may not pre-determine the res judicata effect of its own judgment, no authority cited supports the proposition that the same court that rendered a class action judgment could not *later* determine a collateral attack on that judgment in another case properly before that court. To the contrary, neither Judge Bartle nor Judge Bechtle would be disqualified from hearing Petitioner's collateral attack merely because they had previously participated in the case. *See United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Additionally, courts throughout the federal system are routinely tasked with reexamining their prior decisions, including motions for reconsideration and petitions for rehearing. Moreover, in this case, it is Judge Bartle who would hear Petitioner's collateral attack, not his predecessor Judge Bechtle, who had approved the Settlement Agreement.

There is also no merit in Petitioner's assertion that the MDL Court has no personal jurisdiction over him. First, the MDL Court has jurisdiction over Petitioner's Second Action because the federal court in which he filed that action had jurisdiction. The lower courts have consistently and correctly held that, after a transfer by the JPML, the transferee court has the same jurisdiction as the transferor court – in this case, the Northern District of Alabama where Petitioner initially filed suit. *See In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 297 n.11 (3d Cir. 2004) ("[T]he transferee court can exercise personal jurisdiction to the same extent that the transferor court could."); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987). When Petitioner filed his action in a federal court, he "became subject to the

Federal Rules, including the procedural efficiencies administered by the Multidistrict Panel." *In re Regents of the Univ. of Cal.*, 964 F.2d 1128, 1135 (Fed. Cir. 1992). Petitioner has no legally protected interest in having his challenge heard by any particular federal court. *Gen. Tire & Rubber Co. v. Watkins*, 373 F.2d 361, 370 n.9 (4th Cir. 1967).

Second, because, contrary to his assertions, Petitioner had the right to opt out of the settlement class, the MDL Court obtained jurisdiction over him as a member of the class when he failed to exercise that right, under the principle established in *Shutts*. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), on which Petitioner relies, is inapposite. Unlike the non-opt-out class there, Class Members in the diet drug litigation, including Petitioner, were given the opportunity to opt out of the class. The MDL Court retained continuing jurisdiction to enforce the Settlement Agreement against Wyeth and Class Members such as Petitioner.

There is accordingly no merit to Petitioner's argument that the JPML's transfer somehow violated his rights, much less that he had a "clear and indisputable" right to the grant of mandamus to prevent a usurpation of power by the JPML. *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989).

VI. THE MERITS OF PETITIONER'S COLLATERAL ATTACK WERE NOT BEFORE THE COURT OF APPEALS AND ARE NOT BEFORE THIS COURT

Petitioner spends the majority of his Petition addressing arguments that are wholly irrelevant to the issue that was before the Court of Appeals and that is now presented to this Court. The only issue before the Court of Appeals was whether the JPML properly transferred Petitioner's civil action to the MDL Court. It is also the only issue properly presented to this Court in the petition for writ of certiorari. The availability of collateral review in general, *see* Pet. at 7-11, and the merits of Petitioner's collateral attack, *see* Pet. at 13-20, were not, and could not have been, decided by the JPML and were not before the Court of Appeals. *See In re Ivy*, 901 F.2d at 9 (JPML cannot decide merits of case, so not before circuit court in petition for writ of mandamus under Section 1407(e) of Title 28). The JPML only determined that transfer of Petitioner's collateral attack was proper under the Multi-District Litigation Statute.

Nevertheless, Petitioner misstates an important fact in his argument about the merits of his collateral attack which merits correction under Supreme Court Rule 15.2. Contrary to Petitioner's repeated assertions, Pet. at 3, 15, 16, 17, all Class Members were permitted to exclude themselves from the class, including Class Members claiming PPH. *See In re Diet Drugs*, 2000 WL 1222042, at *25. All Class Members who requested exclusion preserved their right to bring separate actions against Wyeth, including claims allegedly based on PPH, whether or not they met the Settlement Agreement's PPH definition. *See id.* Petitioner did not, however, exercise his right to opt out of the class. Notice of the proposed class certification and settlement,

moreover, was distributed in one of the most extensive notice programs in the history of class action litigation. That program utilized multiple and repeating advertisements on radio and television and in magazines and newspapers, a well-publicized toll-free telephone number to call to obtain a mailed notice package, a website posting copies of the key documents, and other forms of communication. That program was designed to alert former Diet Drug users of the VHD and PPH risks associated with those drugs, which had previously been withdrawn from the market; the massive litigation which had followed that withdrawal; the terms of the proposed Settlement Agreement, including benefits available even to those without any known injuries; the Settlement Agreement's treatment of PPH claims and its definition of PPH; and the opportunity to opt out from or object to the proposed class certification and settlement. *See In re Diet Drugs*, 2000 WL 1222042, at *35-*38.

CONCLUSION

The petition raises no question worthy of certiorari and should be denied.

Respectfully submitted,

PETER L. ZIMROTH*
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022
(212) 715-1010

ROBERT D. ROSENBAUM
SARAH M. BRACKNEY
ARNOLD & PORTER LLP
555 Twelfth Street NW
Washington, DC 20004
(202) 942-5862

* *Counsel of Record*

Attorneys for Respondent Wyeth